

Spring 1967

# Under God? : a study of freedom of religion, the founding fathers, the Supreme Court, and the schools

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UNDER GOD?  
A STUDY OF FREEDOM OF RELIGION, THE FOUNDING  
FATHERS, THE SUPREME COURT, AND THE SCHOOLS

BY  
ALICE SOFIS EVANGELIDES

A THESIS  
SUBMITTED TO THE GRADUATE FACULTY  
OF THE UNIVERSITY OF RICHMOND  
IN CANDIDACY  
FOR THE DEGREE OF  
MASTER OF ARTS

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JUNE 1967

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For  
TINA AND STEPHEN, JR.  
A pair of Philadelphia lawyers,  
junior grade

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## PREFACE

In 1962, the United States Supreme Court handed down its opinion in the Regents' Prayer case. As a result of the decision, the Court was accused of disregarding Constitutional principles and perverting the intentions of the Founding Fathers by outlawing God and prayer from the public schools. As a lawyer, I was disturbed by the vicious nature of the attacks on the Court; as a parent, I was concerned over the divisive effect of the controversy on the schools and the community; and, as a student, I was curious to know exactly what the Court and the Founding Fathers said, and why. This curiosity led me to a study of the writings of the Constitutional period as well as the decisions of today.

The first part of my study concerns the meaning of "religious freedom" as revealed through the fundamental laws of the Constitutional period. In the course of my research, I have compiled and noted every mention of religion in the State Constitutions and Bills of Rights drafted between 1776 and 1791. I have read the Declaration of Independence, Articles of Confederation and the Northwest Ordinance; the Debates in the Constitutional Convention, the State Ratifying Conventions, and the First Congress, and extracted every significant mention of religion. I have not looked behind the words to the actual practice, but rather to the words and phrases themselves, seeking different ways in which a similar idea can be expressed, thus clarifying the meaning of that idea. (I am concerned with what people said rather than what they did; the fact that

in some instances these pronouncements were honored more in the breach than in the observance does not make them any less valid as criteria of what the people thought the law ought to be.)

The second part of my study concerns the interpretation of the religion clauses of the First Amendment by today's Supreme Court, particularly in relation to the schools. I have studied the recent Supreme Court decisions; State laws concerning religion, the public schools and the public purse; public reaction to the Court; Congressional hearings on proposed Constitutional Amendments to "put God back in the schools"; Law Review articles, and much of the now extensive body of literature which dissects, analyzes, criticizes, praises, and vilifies the Supreme Court and its precedent-making decision.

This study would have been impossible without the help and cooperation of a great many people - my debts are many, my gratitude heartfelt. I am especially grateful to the College-Faculty Program of the American Association of University Women for the initial grant which made my return to academia possible; to my parents for their continued support, both moral and financial; and to Mrs. Jacqueline Larsen who did the typing with skill and unlimited patience. I am indebted to Dr. Noble Cunningham, and to Dr. Stanley Friedelbaum of Rutgers - the State University, in whose seminars I first became interested in the subject matter of this study, for their comments, criticisms, and suggestions; to Dr. Barry Westin, for many hours spent in reviewing assorted rough drafts of the manuscript and for his invaluable analysis and critique; and to my advisor, mentor, and friend, Dr. Spencer Albright, Jr., my very special thanks, for without his inspiration and guidance, this thesis might never have been completed. And finally, to my husband, Stephen - chief critic and morale booster - my eternal gratitude for his patience and understanding, and for his encouragement of this housewife's ambitions for a second career.

## PROLOGUE

Learned Hand, one of our most respected jurists, described the Constitution and Bill of Rights as the

...altogether human expression of the will of the state conventions that ratified them; .. their meaning is to be gathered from the words they contain, read in the historical setting in which they were uttered. (Emphasis supplied)<sup>1</sup>

To give meaning to the words of these documents pertaining to religion, I have attempted to collect and examine all the similar words uttered in analagous circumstances by the people of the new nation.

We are a nation that likes to have things in writing. In the period from the Declaration of Independence to the Bill of Rights, the hopes, ideals, aspirations - and prejudices - of the new nation were written into law. In those fifteen years many documents representing the fundamental law of the land were drafted by the representatives of the people. A statute or even a constitution does not usually represent the exact views of any one person or group; however, through compromise and discussion, through the interplay of ideas, the action and interaction of competing and diverse points of view, there is an expression of composite opinion which does reflect the intentions and aspirations of the people as a whole. It is my hope that an examination of all these documents, together with the debates which were prologue to the adoption of the Constitution and the Bill of Rights, might reveal an attitude, a collective opinion -

<sup>1</sup>Learned Hand, The Bill of Rights (Cambridge: Harvard Press, 1958), p.3.

a consensus, if you will - which will illuminate the meaning of "the words they contain" concerning religious liberty.

It is an astonishing fact that the United States Supreme Court did not rule in any substantial way on the meaning of the Establishment clause of the First Amendment until 1947.<sup>2</sup> The Everson case<sup>3</sup> upheld the constitutionality of tax-supported school buses for parochial school children and, for the first time, spelled out a "wall of separation" between church and state based on this clause. Both the majority and minority in this five-to-four decision based their reasoning on the Virginia Statute for Religious Freedom, Madison's Memorial and Remonstrance, and Jefferson's "wall of separation" letter. There have been six more Establishment cases decided since then; the most controversial is the New York Board of Regents' Prayer case.<sup>4</sup> Vehement protests from all segments of society immediately followed this decision in which the Supreme Court held the recitation of a state-prescribed and state-sanctioned prayer in the public schools unconstitutional. The court was accused, among other things, of being Godless. Over 170 amendments to the Constitution have been submitted to the House Judiciary Committee to put God and prayer back into the schools, and to correct the court's obvious "misinterpretation" of the intentions of the Founding Fathers.<sup>5</sup>

How does the Court decide the meaning of a Statute written 175 years ago, on a point that could not possibly have been present in the minds of the men who drafted the legislation? The problem becomes doubly difficult when it

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<sup>2</sup>Robert F. Drinan, Religion, the Courts and Public Policy (New York: McGraw-Hill, 1963), p.3.

<sup>3</sup>Everson v. Board of Education of the Township of Ewing, 330 U.S.1. (1947).

<sup>4</sup>Engle v. Vitale, 370 U.S. 421, (1962).

<sup>5</sup>Time Magazine, May 8, 1964, pp.63-4; Murray Kempton, "Vessels of Christ," The New Republic, May 16, 1964, p.13.



concerns such a personal, emotional, and fundamental liberty as freedom of religion. Every school boy knows that a law requiring Congressmen to be Episcopalians, or requiring the teaching of Catholic dogma in the public schools, or making church attendance mandatory would be in violation of the Constitutional guarantees of freedom of religion and, consequently, void. The issues which confront the Court today do not permit so simple a solution. The status of tax-supported buses for parochial schools, chaplains in the service academies, Christmas carols, voluntary prayers in the public schools, tax-exemptions for church property, and even "In God We Trust" have been or soon will be considered by the Court.<sup>6</sup>

There are two clauses in our fundamental law which together provide the statutory framework for religious freedom in the United States. The first is contained in the Constitution in the last sentence of Article VI:

...but no religious test shall ever be required as qualification to any office or public trust under the United States.

and the other, Article I of the Bill of Rights:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;...

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<sup>6</sup>New York Times, Nov. 14, 1964, p.49; Aug. 19, 1966, p.9E, textbooks; Aug. 21, 1966, p.92, Vermont land use statute for support of religious education; Dec. 14, 1965, p.1, voluntary recitation of nursery school prayer, etc.; Time Magazine, Sept. 3, 1965, p.68, church-run anti-poverty program.

## P A R T I

### Chapter I

#### THE SOVEREIGN STATES

During the Revolutionary and post-Revolutionary period eleven of the thirteen original states drafted Constitutions, Bills of Rights, or both. These documents show a curious mixture of enlightenment and fear. There is, on the one hand, an almost triumphant recognition of the unalienable rights of man, and, on the other hand, a hesitance, a reluctance, to recognize that these rights belong to all men - particularly if these men are too different. There is, however, a definite spirit of toleration which pervades these documents, though in some instances their provisions seem contradictory to us. There was in the minds of the good citizens considerable difference between allowing an "infidel" the right to believe and practice his religion and allowing him to hold an office of public trust. To many Americans of that day there was no conflict between "freedom of conscience" and prohibition against holding office.

The Virginia Bill of Rights, which predates the Declaration of Independence, sets forth the policy of that Commonwealth regarding religion in the much-quoted Section 16.

That religion, or that duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.<sup>1</sup>

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<sup>1</sup>Francis Newton Thorpe, The Federal and State Constitutions Colonial Charters and Other Organic Laws (Washington, D.C.: Government Printing Office, 1909), VII, 3814. Hereinafter referred to as Thorpe.

Despite this, a 1777 statute required church attendance and universal support of the established church. The Anglican Church was disestablished in 1779, but it was not until 1786 with the passage of Jefferson's "an Act for Establishing Religious Freedom" that separation of church and state was complete.

The Virginia Statute of Religious Freedom is not technically within the scope of this study since it is not part of Virginia's Bill of Rights or Constitution. However, its magnificent language is quoted so often as being representative of the attitude of the day that it deserves inclusion among the "fundamental laws."<sup>2</sup> This statute emphatically states that "to compel a man to furnish contributions of money for the propagation of opinions he disbelieves, is sinful and tyrannical;" that civil rights have no dependence on religious opinions, and that "to suffer the civil magistrate to intrude his powers into the field of opinion... is a dangerous fallacy which at once destroys religious liberty"; and that "truth is great and will prevail if left to herself," therefore be it enacted that

no one be compelled to support or frequent any place of worship... nor enforced, restrained, molested or burthened in his body or goods, nor shall suffer on account of his religious beliefs; ... but all men shall be free to profess, and by argument to maintain their opinion, in the matter of religion, and that the same shall in no wise diminish, enlarge or effect their civil capacities. ...

and further, that since these rights are the natural rights of mankind, any attempt to repeal or narrow the statute would be an infringement of natural right.<sup>3</sup> After this statute was passed in 1786, there was no doubt as to Virginia's position with regard to religious freedom.

Connecticut and Rhode Island, the two states which did not pass any

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<sup>2</sup>See particularly Everson v. Board of Education of Township of Ewing, 330 U.S. 1 (1947), where both the majority and minority cite the Statute to support their views.

<sup>3</sup>Henry Steele Commager (ed.), Documents in American History (New York: Appleton-Century-Crofts, Inc., 1949), p.125.

organic laws during this period, relied on their Charters. The only mention of religion in the 1662 Connecticut Charter was a reminder to the settlers of their duty to convert the natives "to Knowledge and Obedience of the only true GOD, and the Savior of Mankind, and the Christian Faith."<sup>4</sup> Rhode Island, with its long tradition of religious freedom, had a unique provision in its royal Charter of 1663. Granted by Charles II, during the period of the religious wars, its religious freedom clause was far in advance of its time - an amazing expression of liberality and toleration:

That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may from tyme to tyme and at all tymes hereafter, freelye and fullye have and enjoye his and their owne judgments and consciences. in matters of religious concernments ... and lawe, statute, or clause, therein containd, or to be containd, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding. .... (Emphasis supplied)<sup>5</sup>

Pennsylvania's Declaration of Rights, adopted in 1776, recognized "that all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding ..." <sup>6</sup> and that "no authority can or ought to be vested in or assumed by any power whatsoever, that shall in any case interfere with or in any manner control the right of conscience in the free exercise of religious worship." <sup>7</sup> This echoes a similar provision in the 1682 "Frame of Government." <sup>8</sup> That same clause also states that no man who "acknowledges the being of a God" can be deprived of any civil right as a citizen because of his "peculiar" mode of religious worship, <sup>9</sup> and no man who is "conscientiously scrupulous" of bearing arms shall be compelled

<sup>4</sup>Thorpe, I, 534.

<sup>5</sup>Ibid., VI, 3213.

<sup>6</sup>Ibid., V, 3082.

<sup>7</sup>Ibid., p.3063.

<sup>8</sup>Ibid., p.3083.

<sup>9</sup>Ibid.

to do so.<sup>10</sup> There was no requirement of belief in God before one might exercise one's right to vote,<sup>11</sup> but all non-Christians were effectively prevented from holding office by the requirement that office-holders take the following oath:

I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the scriptures of the Old and New Testament to be given by Divine inspiration.<sup>12</sup>

Pennsylvania drafted a second constitution in 1790 which modified this provision so that any person "who acknowledges the being of a God, and a future state of Rewards and punishments" shall not because of his religious beliefs be disqualified for "any office or place of trust or profit under this commonwealth."<sup>13</sup> The 1790 Constitution also made a very important addition to the provision regarding the rights of conscience "and that no preference shall ever be given by law, to any religious establishments or modes of worship."<sup>14</sup> Thus, in Pennsylvania by 1790 the law provided for freedom of conscience, no established church, and complete civil rights for all except atheists.

The North Carolina Declaration of Rights of 1776, in language almost identical to that of Pennsylvania, established the "natural and unalienable right to worship Almighty God according to the dictates of their own consciences,"<sup>15</sup> and further "That there shall be no establishment of any one religion, church or denomination in this State in preference to any other ..."<sup>16</sup> No man shall be compelled to support any church,<sup>17</sup> but all persons shall be at liberty to exercise their own mode of worship: "Provided: That nothing herein contained shall be construed to exempt preachers of treasonable or seditious discourses from legal trial and punishment."<sup>18</sup> Their distrust of the clergy was further evidenced by section XXXI which states that no clergyman could be a member of

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<sup>10</sup>Ibid.

<sup>11</sup>Ibid., p.3082.

<sup>12</sup>Ibid., p.3084.

<sup>13</sup>Ibid., p.3100

<sup>14</sup>Ibid.

<sup>15</sup>Ibid., p.2788.

<sup>16</sup>Ibid., p.2793.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

the Senate, House or Council "while he continues in the exercise of the pastoral function."<sup>19</sup> There were no religious qualifications for voting,<sup>20</sup> however, offices or places of trust in the civil department were denied those who did not acknowledge "the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the state."<sup>21</sup>

The New Jersey Constitution, published July 4, 1776, makes no mention of the Deity in its preamble.<sup>22</sup> There is no religious qualification for voting.<sup>23</sup> nor is there any religious disqualification for holding office.<sup>24</sup> No person within this colony shall ever be deprived of the inestimable privilege of worshipping "Almighty God in a manner agreeable to the dictates of his own conscience,"<sup>25</sup> nor be required to pay tithes or taxes to support any church.<sup>26</sup> And further "That there shall be no establishment of any one religious sect in this Province, in preference to any other ..."<sup>27</sup> That same clause, however, goes on to state "that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right merely on account of his religious principles ..."<sup>28</sup> and that all Protestants shall be capable of being elected to any office of public trust. It is interesting to note that this provision does not prohibit non-Protestants from holding office. This, coupled with a further provision that "no religious oath" shall be required to hold office,<sup>29</sup> would indicate that the people of New Jersey, in law if not in fact, had achieved complete religious freedom.

The preamble of New York's Constitution, adopted April 1777, quotes the

<sup>19</sup> Ibid.

<sup>20</sup> Ibid., p.2790

<sup>21</sup> Ibid., p.2793.

<sup>22</sup> Ibid., p.2594.

<sup>23</sup> Ibid., p.2595.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., p.2597.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., p.2598.

Declaration of Independence in its entirety.<sup>30</sup> The qualifications for voting<sup>31</sup> and holding office<sup>32</sup> do not include religious restrictions. Ministers, preachers, priests, etc. are not eligible to hold office while performing their pastoral function,<sup>33</sup> and one who is scrupulous of bearing arms is excused from so doing.<sup>34</sup> To "guard against that spiritual oppression and intolerance ... that have scourged mankind," the people of New York through their representatives ordain, declare and determine

that the free exercise and enjoyment of religious profession and worship, without discrimination or preference shall hereafter be allowed within this State to all mankind ...<sup>35</sup>

This is followed by the fairly common provision that this shall not be construed to excuse licentiousness, or a breach of the peace.

The Delaware Constitution of 1776 did not incorporate a Bill of Rights. There were only two provisions relating to religion in that document.<sup>36</sup> Article 29 states, "There shall be no establishment of any one religious sect in this state in preference to another ..." and that "no minister of the gospel of any denomination shall be capable of holding civil office in this state ..." while he continued in the exercise of his pastoral function.<sup>37</sup> Article 22 sets forth the following oath for office holders:

I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore and I do acknowledge the Holy scriptures of the Old and New Testaments to be given by divine inspiration.<sup>38</sup>

Eighteen years later, in 1792, a new Constitution went into effect which included, in a rather wordy preamble, the acknowledgment that "Through divine

<sup>30</sup>Ibid., p.2623.

<sup>34</sup>Ibid.

<sup>38</sup>Ibid.

<sup>31</sup>Ibid., p.2630.

<sup>35</sup>Ibid., p.2636.

<sup>39</sup>Ibid.

<sup>32</sup>Ibid.

<sup>36</sup>Ibid., I, 562-68.

<sup>33</sup>Ibid., p.2637.

<sup>37</sup>Ibid., p.566.

goodness all men have by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences ...<sup>40</sup> Article One, which is in effect a Bill of Rights, makes it quite clear that "although it is the duty of all to worship the Author of the Universe," "no man shall or ought to be compelled to attend any religious service" or "to contribute to any church or minister ..."<sup>41</sup> nor shall any magistrate "interfere with or in any manner control, the rights of conscience, in the free exercise of religious worship,"<sup>42</sup> nor shall any preference be given by law to any religious societies, denominations, or modes of worship."<sup>43</sup> Section 2 of that same article does away with the 1776 test oath in language identical to that of the United States Constitution.<sup>44</sup>

Maryland, South Carolina, New Hampshire, and Massachusetts were more restrictive in their provisions concerning religion. The Maryland Constitution of 1776 starts with a Declaration of Rights:

That as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons professing the Christian religion, are equally entitled to protection in their religious liberty ... (Emphasis supplied)<sup>45</sup>

This is the only document drafted during this period which restricts protection of religious liberty to Christians. This same statute affirms that a person should not be compelled to contribute to maintain any particular place of worship,<sup>46</sup> but that the legislature may "in their discretion, lay a general and equal tax for the support of the Christian religion ..."<sup>47</sup> leaving to each individual the choice of the particular church.<sup>48</sup> A declaration of belief in the Christian religion is required for holding office;<sup>49</sup> however, each person is

<sup>40</sup> Ibid., p.569.

<sup>44</sup> Ibid.

<sup>48</sup> Ibid.

<sup>41</sup> Ibid.

<sup>45</sup> Ibid., p.1689.

<sup>49</sup> Ibid., p.1790.

<sup>42</sup> Ibid.

<sup>46</sup> Ibid.

<sup>43</sup> Ibid.

<sup>47</sup> Ibid.



allowed to take the oath in accordance with his own religious beliefs,<sup>50</sup> and there is a special concession to Quakers, Mennonites, and Dunkers, who were permitted to "affirm" rather than "swear."<sup>51</sup> There were no religious qualifications for voting, but an oath or affirmation to support the state may be requested.<sup>52</sup> The Maryland distrust of the clergy is evidenced by a provision - which, in similar form, is still incorporated in the Maryland Constitution - which makes void the gift, devise, or sale of lands, goods or chattels to any minister, religious sect, etc., without the consent of the legislature.<sup>53</sup> Although it is not within the scope of this paper, it would be interesting to investigate the forces in the colonial experience of Maryland which led to rather restrictive clauses on religion in an otherwise liberal Bill of Rights.

The South Carolina Constitutions reflect the ambivalent feelings of the people towards religious liberty. The preamble of 1776 mentions the establishment of the Roman Catholic religion in Quebec as one of the causes of South Carolina's discontent.<sup>54</sup> Qualifications for voting and holding office<sup>55</sup> are established, without mention of religion, and the only oath required is to support the Constitution of South Carolina.<sup>56</sup> Two years later a new and more detailed constitution was adopted. Toleration was granted to "all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publically to be worshipped."<sup>57</sup> On the one hand, "The Christian Protestant religion is hereby constituted and declared to be the established religion of this state."<sup>58</sup> On the other hand, "No person shall disturb or molest any religious assembly,"<sup>59</sup> and "no person shall

<sup>50</sup> Ibid.

<sup>54</sup> Ibid., p. 3241.

<sup>58</sup> Ibid.

<sup>51</sup> Ibid.

<sup>55</sup> Ibid., p. 3245.

<sup>59</sup> Ibid., p. 3256.

<sup>52</sup> Ibid., p. 1698.

<sup>56</sup> Ibid., p. 3247.

<sup>53</sup> Ibid., p. 1690.

<sup>57</sup> Ibid., p. 3255.

be obliged to pay towards the maintenance and support of religious worship that he does not freely join in, or has voluntarily engaged to support."<sup>60</sup> All officers of the state must be of the Protestant religion,<sup>61</sup> and no person shall be eligible for a seat in the said Senate unless he be of the Protestant religion,<sup>62</sup> and no member of the clergy may hold office,<sup>63</sup> and "every free white man, and no other person, who acknowledges the being of a God, and believes in a future state of rewards and punishments ..." shall qualify as an elector.<sup>64</sup> Still a third Constitution was ratified in 1790. The religious qualifications for voting<sup>65</sup> and holding office<sup>66</sup> were dropped, as was the establishment clause, but prohibition against the clergy holding office<sup>67</sup> was retained. Article VIII provided in language identical to the 1777 New York Declaration of Rights that

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all man kind: Provided: That the liberty of conscience ... shall not ... excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this State.<sup>68</sup>

The New Hampshire Constitution of January, 1776, the first Constitution framed by an American Commonwealth, was a very short document, apparently intended to be temporary,<sup>69</sup> which makes no mention of religion. After several attempts to draft an acceptable document, a ratifying convention finally accepted in 1784 a Constitution which included a Bill of Rights.<sup>70</sup> Article IV reads:

Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.<sup>71</sup>

Article V gives every person the right to worship God according to the dictates

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<sup>60</sup>Ibid., p.3257.

<sup>64</sup>Ibid., p.3251.

<sup>68</sup>Ibid., p.3264.

<sup>61</sup>Ibid., p.3249.

<sup>65</sup>Ibid., p.3258.

<sup>69</sup>Ibid., IV, 2451.

<sup>62</sup>Ibid., p.3250.

<sup>66</sup>Ibid., p.3259.

<sup>70</sup>Ibid., p.2454.

<sup>63</sup>Ibid., p.3253.

<sup>67</sup>Ibid., p.3261.

<sup>71</sup>Ibid.

of his own conscience, provided he does not disturb the peace nor others in their worship,<sup>72</sup> and further "that every denomination of Christians" shall be equally under the protection of the law, "and no subordination of any one sect or denomination to another shall ever be established by law. ..."<sup>73</sup> The next section acknowledges that "morality and piety" are the best security for government and therefore empowers the legislature to authorize the towns to make provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality. The towns are to have the right of selecting their own teachers and no one is required to support a teacher other than of his own denomination.<sup>74</sup> Only Protestants shall be eligible to hold office,<sup>75</sup> and the oath of office is taken, "so help me God."<sup>76</sup> However, if a person be "scrupulous of swearing," - a concession to the Quakers - he may omit the words "so help me God" and subjoin instead, "This I do under the pains and penalties of Perjury."<sup>77</sup>

The good people of Massachusetts were the most cautious of all the Americans in the granting of religious liberties. The Preamble to their 1780 Constitution pays tribute to the great "legislator of the Universe," and recites in lofty terms a Declaration of Rights:

It is the right as well as the duty of all men in society publically and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the Universe. ...<sup>78</sup>

and further, that no subject shall be hurt, molested,

... for worshipping God in the manner and season most agreeable to the dictates of his own conscience ... provided he does not disturb the peace ...<sup>79</sup>

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<sup>72</sup>Ibid.

<sup>75</sup>Ibid., p.2462.

<sup>78</sup>Ibid., III, 1889.

<sup>73</sup>Ibid.

<sup>76</sup>Ibid., p.2468.

<sup>79</sup>Ibid.

<sup>74</sup>Ibid.

<sup>77</sup>Ibid.

There are no religious qualifications for voting,<sup>80</sup> but an office holder must profess to the Christian religion.<sup>81</sup> A concession is made to Quakers who may "affirm" rather than swear to an oath.<sup>82</sup>

The people of Massachusetts are also convinced that the "preservation of Civil government depends on piety, religion and morality,"<sup>83</sup> and to that end "the people have a right to invest the legislature" with the power to authorize and require the towns to make suitable provision "for the support and Maintenance of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily."<sup>84</sup> Although the towns and parishes do have the right to select teachers and money paid for public worship was to be applied to the sect of their own choosing, public morality was not left to chance - the legislature was empowered to enjoin attendance.<sup>85</sup> On the other hand,

... every denomination of Christians ... shall be equally under the protection of the law and no subordination of any one sect over another shall ever be established by law.<sup>86</sup>

In summarizing the situation that existed in the individual states from the Declaration of Independence to the first session of the Congress under the new Constitution, two things must be kept in mind. First, there are three aspects to complete religious freedom: one, the right to worship (or not to worship) in accordance with one's individual beliefs - that is, freedom of conscience or toleration; two, the disestablishment of a state church; three, the removal of any civil disabilities stemming from belief or disbelief in any particular faith. Second, these Constitutions do not necessarily reflect conditions as they actually existed, but rather represent what the people felt

<sup>80</sup> Ibid., p.1895.

<sup>83</sup> Ibid., p.1889.

<sup>86</sup> Ibid., p.1908

<sup>81</sup> Ibid., p.1903.

<sup>84</sup> Ibid.

<sup>82</sup> Ibid.

<sup>85</sup> Ibid.

"ought to be"; these constitutional provisions represented in many instances an ideal.

All states (with the exception of Maryland which restricted toleration to Christians) recognized that freedom of conscience was the natural right of all men. There was tolerance of differences and a definite recognition of the rights of minorities. Numerous clauses permitted one to "affirm" rather than "swear" in taking an oath, and excused from military service those whose religion did not permit them to bear arms. In many of these documents there are specific statements that no man shall be compelled to support any church.

By the end of the "critical years," of the eleven states which had passed fundamental laws, only Massachusetts and New Hampshire restricted equal protection of the law to Christian sects and specifically required public support of the Christian religion. Delaware, New Jersey, North Carolina and Pennsylvania had specific "no establishment" clauses (and Virginia had passed the Statute of Religious Liberty), and the other states were either silent on the subject of establishment or included a "no preference clause" in their freedom of conscience clause. By the end of this period there were no religious qualifications for voting in any of the Constitutions. Almost all, however, specified that office holders have a belief in a Deity or be Christians or, in the case of New Hampshire, Protestants; they were not convinced that non-Christians were "good" people. The people of the new nation wanted their leaders to be religious, but they were afraid of too close an association with the clergy of any specific denomination. The traditional American anti-clericism is evidenced at this time by emphatic prohibitions in four out of the eleven Constitutions against clergymen holding offices of public trust; they wanted to keep the church out of government and government out of the church.

Americans had come a long way in the post-Revolutionary years - from

persecution to tolerance, from established church to equality for all churches; nor was it only the States which expressed these changes in their legal documents. Such ideas were embodied in the fundamental documents of the new nation as well.

## Chapter II

### THE NEW NATION

With the Declaration of Independence in July of 1776, the thirteen colonies took their first united step towards becoming a free, independent nation. The members of the Philadelphia Congress, referring to the "laws of nature, and nature's God," held it to be self-evident that "all men are created equal," that "they are endowed by their Creator with certain inalienable rights," and that among these rights are "life, liberty, and the pursuit of happiness." There are several references to the Deity, including an appeal to the "Supreme Judge of the world," and an affirmation of reliance on the "protection of Divine Providence," but no specific reference to religion. The Articles of Confederation and Perpetual Union, formally adopted by Congress on November 15, 1777, assert that the several states enter into a "firm league of Friendship"

for their common defense, the security of their liberties and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them or any of them on account of religion ... or any pretense whatever. (Emphasis supplied)<sup>1</sup>

This is the first document of nation-wide scope which mentions religion. This time the Deity is referred to as the "Great Governor" of the world.<sup>2</sup>

The principles that were foreshadowed, though not fully articulated, in

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<sup>1</sup>Jonathan Elliott (ed.), Debates of the State Conventions on the Federal Constitution (Washington, D.C., 1836), I, 108. hereinafter referred to as Elliott.

<sup>2</sup>Ibid., p.113.

the Declaration of Independence were given their first national expression ten years later. At the very time that the Constitutional Convention was meeting, the Congress of the Confederation passed the Northwest Ordinance of 1787, which established the policy for governing that territory and for the future expansion of the United States. Even more important, it guaranteed to the future inhabitants of the territory a full bill of rights embodying

... the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish these principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed. ...<sup>3</sup>

Its first Article provided that "no person, demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory." A precedent of national concern for religious freedom was established; for the first time in history free men voluntarily secured not for themselves but for others the "inalienable rights of man."

The Constitution of the United States contains only one mention of religion, the last clause of Article VI: "... but no religious test shall ever be required as qualification to any office or public trust under the United States." The subject of religion was not at issue. The first mention of religion noted in the official Journal of the Convention<sup>4</sup> was not until August 30, more than three months after the delegates began their deliberations. Madison's notes, however,<sup>5</sup> indicate that Charles Pinckney submitted a Plan of a Federal

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<sup>3</sup>Thorpe, II, 957.

<sup>4</sup>Elliot, I, 306.

<sup>5</sup>Henry D. Gilpin (ed.), The Madison Papers: His Reports of the Debates in the Federal Convention (Washington, D.C.: Langtree and O'Sullivan, 1840), III, 741. (This will hereafter be cited as Madison Papers.) See also Max Farrand (ed.), Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1911; Vol. IV, 1937), IV, 28. hereinafter referred to as Farrand.



Constitution on May 28, 1787. This plan, which was quite detailed, included a provision that "The legislature of the United States shall pass no law on the subject of religion,"<sup>6</sup> and called for

The Prevention of Religious Tests as qualifications of Offices of trust or Emolument ... the last a provision of the world will expect from you, in the establishment of a System founded on Republican Principles, and in an age so liberal and enlightened as the present.<sup>7</sup>

Mr. Pinckney added,

our true situation seems to be this, - a new extensive country containing within itself, the materials of forming a government capable of extending to its citizens all the blessings of civil and Religious liberty.<sup>8</sup>

There is no record of any debate on Mr. Pinckney's plan.

The next mention of religion was on August 20, when Madison notes that Pinckney submitted to the House, in order to be referred to the Committee of Detail, "sundry propositions" concerning the powers of the legislature, including the following:

No religious test or qualification shall ever be annexed to any oath of office under the authority of the United States.

This was part of a list which included other personal liberties, habeas corpus, liberty of the press, subordination of the military to civilian authority, etc.<sup>9</sup>

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<sup>6</sup> Madison Papers, II, 720.

<sup>7</sup> Farrand, III, 122. The entire plan is quoted in Farrand, III, 106ff. The editor notes that this part was evidently added later since it is not in keeping with the rest of the plan. Madison states in his notes that because of the length of the paper submitted by Mr. Pinckney, he did not take notes, and that the copy which is inserted in his notes was taken from papers furnished to the Secretary of State and published in 1819. Madison Papers, III, Appendix vi.

<sup>8</sup> Farrand, IV, 28. This is from Mr. Pinckney's version of his own speech which is included in the 1837 addition to Mr. Farrand's work. Unless more contemporary reports are discovered, it is unlikely that we will ever know how accurate these reports are.

<sup>9</sup> Madison Papers, III, 1366; Farrand, II, 342.

This was referred to that committee without debate.<sup>10</sup> On August 30th Article 20 was taken up (now Article VI dealing with the oath of office). Mr. Pinckney moved to add to the Articles: "But no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States."<sup>11</sup> Mr. Sherman of Connecticut thought it unnecessary, "the prevailing liberality being sufficient security against such tests."<sup>12</sup> Mr. Gouverneur Morris and General Pinckney seconded the motion,<sup>13</sup> and it was passed unanimously.<sup>14</sup> The whole article was then approved with North Carolina voting "No," and Maryland divided.<sup>15</sup> All states were present that day except New York and, of course, Rhode Island.<sup>16</sup>

The Committee of Style reported on that clause on September 12th, eliminating the words "under the authority of,"<sup>17</sup> and on September 17, 1787, the final draft showed no further change.<sup>18</sup>

Religion, as such, was not mentioned again. There was, however, a brief discussion on the inclusion of a Bill of Rights. On September 12th, Mr. Elbridge Gerry of Massachusetts urged the necessity of jury trials to guard against corrupt judges.<sup>19</sup> Colonel Mason perceived the difficulty and

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<sup>10</sup> Ibid.

<sup>11</sup> Madison Papers, III, 1468; Farrand, II, 468; Elliot, I, 306.

<sup>12</sup> Ibid.

<sup>13</sup> Madison Papers III, 1468; Farrand, II, 468.

<sup>14</sup> Elliot, I, 306.

<sup>15</sup> Madison Papers, III, 1468; Farrand, II, 468.

<sup>16</sup> Elliot, I, 306.

<sup>17</sup> Madison Papers, III, 1543; Farrand, II, 579, 603.

<sup>18</sup> Madison Papers, III, 1622; Farrand, II, 663.

<sup>19</sup> Madison Papers, III, 1565.

wished the plan had been prefaced with a bill of Rights and would second a motion if made for that purpose. It would give great quiet to the people; and with the aid of the States Declarations a Bill might be prepared in a few hours.<sup>20</sup>

Gerry concurred in the idea and moved for a Committee to prepare a Bill of Rights; the motion was seconded by Colonel Mason. The only recorded debate on this motion consists of a statement by Mr. Sherman that he "was for securing the rights of the people where requisite," but that "the State Declarations of Rights are not repealed by this Constitution, and being in force are sufficient." Mason answered that the laws of the United States are paramount to State Bills of Rights.<sup>21</sup> The official Journal of the Convention indicates that this was defeated unanimously, 10 no, 0 aye.<sup>22</sup> However, Madison's notes indicate 5 in favor - New Hampshire, Connecticut, New Jersey, Pennsylvania, and Delaware - and 5 against - Maryland, Virginia, North Carolina, South Carolina, and Georgia, with Massachusetts listed as absent.<sup>23</sup> (Since at least one delegate from Massachusetts was present, one wonders if Madison didn't mean "abstain" instead of absent.) The North-South division in the voting brings to mind the statement of General Pinckney in the South Carolina Convention. It is also interesting to note that the three men who did not sign the Constitution, Mason, Gerry, and Randolph, were proponents of a Bill of Rights from states which did not support a Bill of Rights.

On September 14 Mr. Madison and Mr. Pinckney moved to include in the powers of Congress the power to establish a university in which "no preference or distinction should be allowed on account of religion."<sup>24</sup> Mr. Wilson

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Elliot, I, 336; Farrand, II, 582.

<sup>23</sup> Madison Papers, III, 1565.

<sup>24</sup> Farrand, II, 616; Madison Papers, II, 740.

supported the motion but Mr. Morris felt such a power was not necessary because of Congress's exclusive power at the Seat of Government. The motion was defeated 6 to 4 with one divided.<sup>25</sup> There was no further discussion concerning religion, and the completed Constitution containing only one reference to religion was submitted by Congress for transmittal to the States.

A letter from James Madison to George Washington, dated September 30, 1787,<sup>26</sup> indicates that Richard Henry Lee proposed the addition of a Bill of Rights to the Constitution before it should go forth from the Convention to Congress. In this action he was supported by Melancthon Smith. The Bill of Rights was to contain provisions for "trial by juries in civil cases, and several other things corresponding with the ideas of Colonel Mason."<sup>27</sup> (Presumably, this would have included provisions concerning religious liberty.) It was contended that the Confederation Congress had an undoubted right to insert amendments, and that "it was their duty to make use of it in a case where the essential guards of liberty had been omitted." The principal argument against the addition of a Bill of Rights at this point was that any action of the Congress would have to be addressed to the legislatures of the various states and not to the conventions, and that, therefore, being addressed to the legislatures under the Articles would require unanimous consent. The matter was therefore dropped.

There was considerable unanimity of opinion at the Constitutional Convention that the Federal government as a government of delegated powers had no authority in the matter of religious liberty, that this was a concern of the

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<sup>25</sup>Farrand, II, 616; Pennsylvania, Virginia, North Carolina, South Carolina, aye; New Hampshire, Massachusetts, New Jersey, Delaware, Maryland, Georgia, no; Connecticut, divided.

<sup>26</sup>Madison Papers, II, 643-45.

<sup>27</sup>Ibid.

states. The Confederation government did have authority over the government of territories and anticipated the action of the state ratifying conventions by providing a full Bill of Rights for the Northwest Territory patterned on the various state Bills. It is logical to assume that the Confederation Congress was granting to future states those same "inalienable rights of man" which were already recognized by the existing states.

As was pointed out previously, the last step to complete religious freedom is the removal of civil disabilities because of religious beliefs. That no "religious test shall be required" by the Constitution was accepted without debate, almost as a matter of course.

### Chapter III

#### WE THE PEOPLE

The Federal Constitution as submitted to the states contained only one clause pertaining to religion - "no religious test shall be required to hold an office of trust under the United States." There was concern in the state conventions because there was no Bill of Rights to protect newly won freedoms, among them, the freedom of conscience. One gets the impression that the religious problem had already been settled on the state level, and that in the discussions of the Rights of Man, freedom of religion was added almost as an afterthought. The convention delegates were far more concerned with the traditional "rights of Englishmen," the "legal" safeguards such as trial by jury, right of habeas corpus, protection against unreasonable searches and seizures, etc.<sup>1</sup>

The records of the ratifying conventions appear far from complete; yet it is clear from those we have that debates regarding any aspect of religious freedom occupied a very small portion of the time spent in discussing the Constitution. The Delaware Convention, which ratified first and unanimously, left neither a record of its debates nor any suggestions for amendments.<sup>2</sup>

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<sup>1</sup>Jackson Turner Main, in his Anti-Federalists: Critics of the Constitution (Chapel Hill: University of North Carolina Press, 1961), confirms this view. "Generally ratification conventions that drafted Bills of Rights included religious freedom as a matter of course, but other amendments seemed far more important." Religious freedom "was least mentioned apparently because there was nothing in the Constitution that threatened it and no special safeguards were deemed necessary," pp. 158-59.

<sup>2</sup>Elliot, I, 349.

Georgia, less than a month later, also ratified unanimously, and without qualification.<sup>3</sup> New Jersey, too, accepted the Constitution without qualification, leaving no record of any debates which may have taken place.<sup>4</sup> Rhode Island, the last state to ratify the Constitution, similarly left no record of its debates but left no doubt as to its position in regard to religion. Among the amendments proposed by Rhode Island was one that provided that a person religiously scrupulous of bearing arms ought to be exempt upon the payment of an equivalent<sup>5</sup> and

IV. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence, and therefore, all men have a natural, equal, and unalienable right to the exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.<sup>6</sup>

The only speech preserved from the New Hampshire convention dealt exclusively with the slavery question. The New Hampshire convention did however submit several amendments, including

XI. Congress shall make no laws touching religion or to infringe the rights of conscience.<sup>7</sup>

The records of the Maryland convention are not clear. A committee of the convention was appointed to prepare a list of amendments to the Constitution. That committee apparently feared that state Bills of Rights and Constitutions might be repealed by Congress. They submitted twelve amendments to the convention for consideration, the first that Congress shall have no power other than that expressly delegated to it.<sup>8</sup> An amendment "that there shall be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty" was submitted to the committee but rejected by

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<sup>3</sup>Ibid., p.355.

<sup>5</sup>Ibid., p.370.

<sup>7</sup>Ibid., p.358.

<sup>4</sup>Ibid., p.351.

<sup>6</sup>Ibid.

<sup>8</sup>Ibid., II, 509.

it.<sup>9</sup> Maryland ratified the Constitution but rejected the amendments proposed by its committee.<sup>10</sup> They were obviously not influenced by a letter from Luther Martin giving his views on the Constitution.<sup>11</sup> Martin, Attorney General of Maryland and delegate to the Constitutional Convention in Philadelphia, had many objections to the Constitution including the lack of a Bill of Rights. One can't be sure whether the following comment is sincere or sarcastic:

The part of the system which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States was adopted by a great majority of the Convention, and without much debate; however, there were some members so unfashionable as to think that a belief in the existence of a Deity and of a state of future rewards and punishments would be some security for the good conduct of our rulers ... and that distinction between the professors of Christianity and downright infidelity or paganism.<sup>12</sup>

Connecticut, too, ratified unconditionally.<sup>13</sup> The only mention of religion in the Connecticut debates is in answer to a question regarding the oath.

The Hon. Oliver Wolcott replied as follows:

I do not see the necessity of such a test as some gentlemen wish for. ... For myself, I should be content either with or without the clause in the constitution which excludes test laws. Knowledge and liberty are so prevalent in this country that I do not believe that the United States would ever be disposed to establish one religious sect and lay all others under legal disabilities.<sup>14</sup>

He added that any such test would be injurious to the rights of free citizens<sup>15</sup> and that it would not be "altogether superfluous to have added a clause which secures us from the possibility" of being deprived of those rights.<sup>16</sup>

New York submitted proposed amendments to the Constitution, including a statement that

the people have an equal, natural and unalienable right freely and peaceably to exercise their religion according to the dictates of

<sup>9</sup>Ibid., p.512

<sup>12</sup>Elliot, I, 419.

<sup>15</sup>Ibid.

<sup>10</sup>Ibid., I, 381.

<sup>13</sup>Ibid., p.349.

<sup>16</sup>Ibid.

<sup>11</sup>Farrand, III, 172.

<sup>14</sup>Ibid.



conscience; and that no religious sect or society ought to be favored or established by law in preference to others.

The subject of religion was not otherwise mentioned in the course of the debates which take almost 200 pages to report.

In Pennsylvania the burden of defending the Constitution fell on James Wilson, the only member of the Philadelphia convention who was also a member of the ratifying convention. Although the debates in Pennsylvania were fairly extensive, there was only one specific mention of religion. The question was raised, almost in passing, that there was "no security for rights of conscience."<sup>17</sup> Wilson responded with another question: "I ask this honorable gentleman, what part of this system puts it in the power of Congress to attack those rights?"<sup>18</sup> The omission of a Bill of Rights was questioned several times.<sup>19</sup> In each case the answer was the same:

A proposition to adopt a measure, that would have supposed that we were throwing into the general government, every power not expressly reserved by the people would have been scorned at in that house. ... In a government of enumerated powers it would not only be unnecessary but preposterous and dangerous.<sup>20</sup>

One can almost feel the tempers rising when Mr. Wilson says:

If the minority are contending for the rights of mankind, what then are the majority contending for? ... the majority must be contending for the doctrine of tyranny and slavery. ... Are the majority in this assembly ... are they not the people?<sup>21</sup>

Although the Pennsylvanians accepted the Constitution without appending amendments, the delegates appointed a committee to deliberate and propose amendments "in order to remedy these inconveniences and to avert apprehended danger." That committee's recommendations included provisions regarding the poll tax, standing armies, selection of Senators and that "every reserve of the rights of individuals, made by the several constitutions of the states in the union ... shall remain inviolable, except insofar as they are expressly ... yielded ..."<sup>22</sup>

<sup>17</sup> Ibid., p.425.

<sup>19</sup> Ibid., pp.408, 426, 491.

<sup>21</sup> Ibid., p.460.

<sup>18</sup> Ibid.

<sup>20</sup> Ibid., p.408.

<sup>22</sup> Ibid., p.503.

Religion is not specifically mentioned. There is obviously a general recognition of the "rights of man" - the only problem was to keep the central government from interfering.

In Massachusetts, as might be expected from a reading of her constitution, there were several delegates who objected to the "no religious test" clause of the Constitution. The most able defenders of that clause were members of the clergy. The Hon. Mr. Singletry thought that men in power should have some religion, preferably Christian, "yet by the Constitution a Papist or an infidel were as eligible as they."<sup>23</sup> Several others urged that the clause was a "departure from the principles of our forefathers who came for the preservation of religion."<sup>24</sup> Col. Jones of Bristol stated that his principal objection to the Constitution was the absence of a religious test. He "thought that a person could not be a good man without being a good Christian."<sup>25</sup> This was the strongest statement on this subject made in any of the conventions. These objections were very ably answered. The Rev. Mr. Shute gave a long dissertation on the merits of the clause and the merits of all religions, and concluded by saying,

There are worthy men in all denominations - ... even among those who have no other guide in the way of virtue and heaven than the dictates of natural religion.<sup>26</sup>

and that the inclusion of such a test would be of no advantage since the unscrupulous would not hesitate to take the oath, only the honest would be excluded. "The exclusion of religious test in the proposed constitution therefore appears clearly, to me, sir, to be in favor of its adoption."<sup>27</sup> The Rev. Mr. Payson of Suffolk County added that a religious test would be a "blemish on the instrument" for "God alone is the God of the conscience," and

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<sup>23</sup> Ibid., II, 70.

<sup>25</sup> Ibid., p.132

<sup>27</sup> Ibid.

<sup>24</sup> Ibid., p.131.

<sup>26</sup> Ibid., p.136.

attempts to "erect human tribunals for the consciences of men are impious encroachments upon the prerogatives of God."<sup>28</sup> Shortly before the convention was to adjourn, the Rev. Mr. Backus asked leave to give his thoughts on the exclusion of a religious test. His defense of this clause was most thoughtful and well-reasoned.

Many appear to be concerned about it; but nothing is more evident both in reason, and in the holy scriptures, than that religion is ever a matter between God and individuals; and therefore, no man or men can impose any religious test without invading the essential prerogatives of our Lord Jesus Christ. ... And let the history of all nations be searched from that day to this, and it will appear that the imposing of religious tests hath been the greatest engine of tyranny in the world. And I rejoice to see so many gentlemen, who are now giving in their rights of conscience, in this great and important matter. Some serious minds discover a concern lest, if all religious tests should be excluded, the Congress would hereafter establish Popery or some other tyrannical way of worship. But it is most certain, that no such way of worship can be established without any religious test.<sup>29</sup>

The people of Massachusetts, "acknowledging with grateful hearts, the goodness of the Supreme Ruler of the Universe,"<sup>30</sup> ratified the Constitution without further mention of religion. They submitted several amendments including amounts involved in jury trials, taxation, representation, reservations of powers, but none involving religion.<sup>31</sup>

In the South Carolina legislature, which unanimously agreed to call a convention to consider the Constitution, a Mr. Lincoln inquired, "Why was this constitution not ushered in with the bill of rights?" "Are the people to have no rights?"<sup>32</sup> General Charles Coatsworth Pinckney gave the familiar answer that in a government of delegated powers it would not be necessary, then submitted an additional reason for not including a Bill of Rights - the reason, no doubt, that South Carolina did not support the motion for a Bill of Rights in the Constitutional Convention.

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<sup>28</sup>Ibid., p.128.

<sup>30</sup>Ibid., I, 353.

<sup>32</sup>Ibid., p.301.

<sup>29</sup>Ibid., p.156.

<sup>31</sup>Ibid.

Another reason weighed heavily with men of this state; such bills usually begin with a declaration that all men are by nature free, now we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves.<sup>33</sup>

The debates in South Carolina were not particularly stimulating; religion was mentioned only twice, once in passing,<sup>34</sup> and once when Mr. Charles Pinckney, in what appears to be an attempt to forestall arguments, embarked on a discussion of political theory. Referring to England he said,

even the government I have alluded to, withholds, from a part of its subjects, the equal enjoyment of their religious liberties. How many thousands of the subjects of Great Britain, at this moment labor under civil disabilities, merely on account of their religious persuasions! To the liberal and enlightened mind, the rest of Europe affords a melancholy picture of the depravity of human nature, and of the total subversion of those rights, without which we should suppose no people should be happy or content.<sup>35</sup>

Despite Mr. Pinckney's discussion, the South Carolinians appended several resolutions to their ratification, including one which stated that the third section of the sixth Article ought to be amended by inserting the word "other" between the words "no" and "religion," making that section read, "no other religious test shall ever be required as qualification to any office or public trust under the constitution."<sup>36</sup> The South Carolinians would have preferred to apply their own religious test to Federal as well as state offices - the only state to so indicate.<sup>37</sup> (It is interesting to note that only two years later their State Constitution eliminated religious qualification for holding office.)

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<sup>33</sup>Ibid., IV, 301.

<sup>35</sup>Ibid., p.306.

<sup>34</sup>Ibid., p.313.

<sup>36</sup>Ibid., I, 357.

<sup>37</sup>In The Bill of Rights and What It Means Today, (Norman: U. of Okla. Press, 1957), p.20, Edward Dumbauld states "This refinement of logic would have recognized the taking of the oath as a religious test rather than as a mere solemnity imposing an obligation under public law." He refers to this as "meticulous reasoning" on the part of the delegates, overlooking the fact that South Carolina already required a religious test.

One of the major objections of the Virginia delegates was the absence of a Bill of Rights. This theme was repeated again and again.<sup>38</sup> Patrick Henry conducted a one-man filibuster in proposing the addition of a Bill of Rights. In his usual dramatic style he stated "it is radical in this transition, our rights and privileges are endangered. ... The rights of conscience, trial by jury, liberty of the press ... are rendered insecure. ..." <sup>39</sup> His mention of religion was always as one of several rights which needed to be protected. He appeared far more concerned with the many "legal and procedural" safeguards. Freedom of religion under the Constitution was ably and eloquently defended by Randolph, by Madison, by Innes, and by a Mr. Zachariah Johnson. Edmund Randolph said that he previously objected to the Constitution, but that he was convinced that since no religious test was required, no express power over religion was given to the Federal Government; therefore, as a government of enumerated powers, it could not interfere in that area.<sup>40</sup>

Further,

The variety of sects which abound in the United States is the best security for freedom of religion. No part of the constitution even if strictly construed, will justify a conclusion, that the general government can take away or impair the freedom of religion.<sup>41</sup>

Mr. Zachariah Johnson of Augusta County, in an excellent defense of the whole Constitution, pointed out that the vastness of the country, the diversity of opinion and variety of sects in the United States would make it difficult to establish a religion, and that anyone who attempted to do so would be "universally detested and opposed and easily frustrated."<sup>42</sup> Madison, too, in his able fashion defended the Constitution on this matter.<sup>43</sup> But it was left to Mr. Innes to call attention to the contradictory arguments of the anti-Federalists on the

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<sup>38</sup>Thorpe, III, 72, 162, 431, 411, 311.

<sup>40</sup>Ibid., p.207.

<sup>42</sup>Ibid., p.581.

<sup>39</sup>Ibid., p.72.

<sup>41</sup>Ibid., p.431.

<sup>43</sup>Ibid., III, 313.

matter of religion.

Can it be said that liberty of conscience is in danger? I observe on the side of the Constitution, those who have been champions of religious liberty, an attack on which I would as soon resist, as one on civil liberty. Do they employ consistent arguments to show it is in danger? They inform you that Turks, Jews, Infidels, Christians, and all other sects, may be presidents and command the fleet and army, there being no test required. And yet the tyrannical and inquisitorial Congress will ask me as a private citizen, what is my opinion on religion, and punish me if it does not conform to theirs. I cannot think the gentleman could be serious when he made these repugnant and incompatible objections.<sup>44</sup>

The main debates in Virginia centered around the question of whether or not ratification should be made conditional on the acceptance of certain amendments, or whether the Constitution should be ratified and amendments recommended. The proponents of unconditional ratification won out in Virginia, and a committee was appointed to submit recommendations for amendments.<sup>45</sup> That committee's report, which was adopted by the convention,<sup>46</sup> included the Virginia Declaration of Rights, a Bill of Rights with twenty provisions and twenty additional amendments to the Constitution itself.<sup>47</sup> The "Whereas" clause of that report made it quite clear that the powers granted under the proposed Constitution were the gift of the people, and that every power not granted remained with the people;

therefore no right of any denomination can be cancelled, abridged, restrained or modified, by the Congress, by the Senate, or the House of Representatives acting in any capacity, by the president or any department, or officer of the United States, except in those instances on which power is given by the constitution for those purposes; and that among other essential rights, the liberty of conscience, and of the press cannot be cancelled ... by any authority of the United States.<sup>48</sup>

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<sup>44</sup> Ibid., p.573. The gentleman referred to is Patrick Henry and is an obvious reference to the fact that the proponents of the Constitution were also proponents in the struggle to pass the Virginia Statute of Religious Liberty, which Henry opposed.

<sup>45</sup> Ibid., p.587.

<sup>47</sup> Ibid.

<sup>46</sup> Ibid.

<sup>48</sup> Ibid., I, 360.

There was, however, no specific clause in the body of amendments concerning religious freedom. The debates in Virginia are considered by historians and scholars to be the most complete and thorough of those in any state; a whole volume of Elliot's is required to record the proceedings. Yet the subject of religion was debated only briefly on three different occasions. It was obviously not a major issue.

In North Carolina, on the other hand, there was a more thorough and sometimes fantastic discussion of the subject of religion. The Constitution was considered clause by clause, when the last clause of Article 6 was introduced, Mr. Henry Abbot summed up the questions in the minds of the delegates.<sup>49</sup> "some are concerned that they would be deprived of worshipping God according to their consciences" and wished to know if the "general government can make laws infringing on their religious liberties."<sup>50</sup> Others feared that under the treaty-making power Roman Catholicism could be adopted.<sup>51</sup> Still others wanted to know which religion would be established (Mr. Abbot says that he himself is against exclusive establishment, but if there were any, "I would prefer the Episcopal").<sup>52</sup> And the major objection seemed to be that the exclusion of tests was impolitic and dangerous - "pagans, deists and Mohametans" might obtain office;<sup>53</sup> Mr. Abbot also wondered what form of oath would be used.<sup>54</sup> He concluded, "We ought to be suspicious of our liberties. We have felt the effects of oppressive measures, and know the happy consequence of being jealous of our rights. Could I conceive that such objections are well founded, I would declare my opinion against." It is difficult, if not impossible, to evaluate the written word 200 years after the fact; however, there is a naivete about Mr. Abbot's speech which leads one to believe that he was sincerely seeking explanations.

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<sup>49</sup>Ibid., IV, 105.

<sup>51</sup>Ibid.

<sup>53</sup>Ibid.

<sup>50</sup>Ibid.

<sup>52</sup>Ibid.

<sup>54</sup>Ibid., p.199.

that he really wanted to know what effect this new Constitution would have on religious liberties.

Governor Johnson expressed astonishment that the people were alarmed on the subject of religion. "This must have arisen from the great pains which had been taken to prejudice men's minds against the constitution."<sup>55</sup> Mr. James Iredell (who is later appointed to the Supreme Court) answered Mr. Abbot, point by point. "I consider this clause under consideration as one of the strongest proofs that it was the intention of those who formed the system, to establish a general religious liberty in America." He called attention to England where an oath is required for holding office which he said "degrades and profanes the rite."<sup>56</sup> "Is there any power given to Congress in matters of religion?"<sup>57</sup> He answered his own question and went on to say, "happily, no sect is superior to another" and that as long as this is the case, we shall be free from those persecutions and distraction with which other countries have been torn.<sup>58</sup> As for the contention that our representatives would have no religion, he asked, "Is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly content for? ... It would be happy for mankind if religion was permitted to take its own course, and maintain itself by the excellence of its own doctrines."<sup>59</sup>

Mr. Iredell told the assembled delegates that he came across a pamphlet contending that the Pope in Rome could be elected President. One can almost hear the scorn in his voice when he reminds his hearers that under the Constitution this would be impossible - the Pope couldn't meet the residence requirements!<sup>60</sup> As to the question regarding the form of the oath - simple enough;

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<sup>55</sup>Ibid., p.200.

<sup>56</sup>Ibid., p.196.

<sup>57</sup>Ibid., p.197.

<sup>58</sup>Ibid.

<sup>59</sup>Ibid.

<sup>60</sup>Ibid., p.198.



the oath "would be administered in the form which would bind his conscience most"<sup>61</sup> and this would be determined by the beliefs of the individual taking the oath.<sup>62</sup> Governor Johnson picked up the case for the defense of the Constitution and said that there are only two instances in which a non-Christian can be elected to office: first, if the people themselves set aside the Christian religion, they will elect one who thinks as they do; and second, if a person, notwithstanding his religion gets the esteem and confidence of the people by his good conduct and virtue.<sup>63</sup> As to the establishment of a religion, he felt it would be impossible in this country because of the diversity of sects; to illustrate this point he listed the states and the various religions prevalent in each one.<sup>64</sup>

A Mr. Spencer discussing the oath said that a test oath does not exclude men of bad character because they would not hesitate to take the oath, "But in this case as there is not a religious test required, it leaves religion on the solid foundation of its own inherent validity without any connection with temperal authority and no kind of oppression can take place."<sup>65</sup> Mr. Wilson and Mr. Lancaster<sup>66</sup> continued to object to the lack of a religious test oath. The latter presented the most logical case for the opposition.

As to the religious test, had the article which excluded it, provided that none but what had been in the states heretofore, I would not have objected to it. It would secure religion. Religious liberty ought to be provided for. ... I did not suppose that the pope could occupy the president's chair. But let us remember that we form a government for millions not yet in existence. I have not the art of divination. ... This is most certain, that papists may occupy that chair and mahometans may take it. There is a disqualification I believe in every state in the union - it ought to be so in this system. (Emphasis supplied)<sup>67</sup>

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<sup>61</sup>Ibid., p.200.

<sup>63</sup>Ibid., p.201.

<sup>65</sup>Ibid., p.202.

<sup>62</sup>Ibid.

<sup>64</sup>Ibid.

<sup>66</sup>Ibid., p.212.

<sup>67</sup>Ibid., p.215. see also similar expression in South Carolina, p.30, herein.

It is interesting and perhaps significant that this was the only time in the recorded debates that this suggestion was made -- a very logical one for those who were concerned not only about the "papists and mahometans" but also about the role of the states in the new government.

There was considerable debate in North Carolina, as in Virginia, as to whether the Constitution should be accepted immediately or after the addition of amendments. Iredell suggested that it be ratified immediately so that North Carolina delegates could participate in the first Congress and have a hand in the drafting of the Bill of Rights.<sup>68</sup> Willie Jones, one of the leaders of the opposition, quoted a letter from Jefferson to Madison stating that he (Jefferson) wanted nine states to ratify in order to preserve the union, and the others to reject so that there might be certainty of amendments.<sup>69</sup> To help solve this problem, a committee was appointed to submit amendments.<sup>70</sup> The report of that committee, entered on the journal prior to a vote on the Constitution itself, began,

Resolved: That a declaration of rights asserting and securing from encroachment the great principles of civil and religious liberty and the unalienable rights of the people ought to be laid before Congress. ...<sup>71</sup>

and included a Declaration of Rights of twenty sections, and twenty-six amendments to the Constitution itself. The twentieth section of the Declaration of Rights was lifted verbatim from the 1776 Virginia Declaration but adds

that no particular religious sect or society ought to be favored or established by law in preference to others.<sup>72</sup>

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<sup>68</sup> Ibid., p.221.

<sup>69</sup> Ibid., p.224; see also Carl Van Doren, The Great Rehearsal, New York, The Viking Press, (1948), p.217.

<sup>70</sup> Elliot, p.237.

<sup>72</sup> Ibid.

<sup>71</sup> Ibid., p.238.

It was this identical amendment which Rhode Island submitted to the Congress almost two years later. Despite the parliamentary maneuvering, the convention adjourned August 2, 1788, without accepting or rejecting the Constitution. The Committee report and the Constitution itself were finally accepted by North Carolina in November of 1789.<sup>73</sup>

The records of the debates of the ratifying conventions fill more than three volumes of Elliot's and every significant reference to religion has been mentioned herein - it is obvious that religion was a relatively minor issue. There did not appear to be a great concern about religion as such in the ratifying conventions, perhaps because it was a freedom which was not then being threatened. There was far greater concern and far more discussion about the traditional "rights of Englishmen," those rights such as trial by jury, habeas corpus, etc., those legal safeguards which their colonial experience had taught them could be withheld with disastrous results. It was the protection of these rights which led to the Bill of Rights; a clause protecting religious freedom was added almost as an after-thought, and in several instances without any discussion.

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<sup>73</sup>Ibid.

## Chapter IV

### IN CONGRESS ASSEMBLED

In the opinion of many Congressmen, the first order of business of the newly convened Congress of the United States was the preparation of Amendments to the Constitution. Many of the ratifying conventions had made it abundantly clear that they were not satisfied that their rights were adequately protected from the new central government. On June 8, 1789, a motion was made in the House of Representatives to consider amendments to the Constitution.<sup>1</sup> A committee, consisting of a member from each state, was appointed to meet and consider the various proposals which had been submitted by the States.<sup>2</sup> The committee, led by Madison, made its report on July 28th and August 13th, 1789; the House met as a committee of the whole. The recorded debates for that session are very brief. The amendments concerning religion were consolidated into one, which as originally submitted, was as follows:

no religion shall be established by law, nor shall the equal rights of conscience be infringed.<sup>3</sup>

A Mr. Sylvester was concerned about the way it was expressed; he feared it might tend to abolish religion altogether.<sup>4</sup> Mr. Gerry felt it would read

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<sup>1</sup>History of Congress, The Proceedings of the Senate and House of Representatives, 1789-93 (Philadelphia: Lea and Blanchard, 1843), I, 152. hereinafter referred to as History of Congress.

<sup>2</sup>Ibid.

<sup>3</sup>Debates of Congress, from 1789 to 1856 (New York: D. Appleton and Company, 1857), I, 136.

<sup>4</sup>Ibid.

better if it was that "no religious doctrine shall be established by law,"<sup>5</sup> and Mr. Sherman insisted, as he had at the Constitutional Convention, that the whole thing was unnecessary because Congress had no power in that area.<sup>6</sup>

Mr. Carroll was in favor of adopting the words because

the rights of conscience are in their nature of peculiar delicacy and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not secured under the present constitution ... it would tend more towards conciliating the minds of the people to the government than almost any other proposed amendment.

He was not disposed to argue over the phraseology - his object was to secure the substance in such a measure "as to satisfy the wishes of the honest part of the community."<sup>7</sup>

James Madison advised the House that he understood the words to mean

that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.<sup>8</sup>

A Mr. Huntington said that he understood it the way Madison did, but that others had construed it "in such a latitude as to be extremely hurtful to the cause of religion." Ministers and meeting houses were supported by contributions of those who belonged to their societies which were regulated by by-laws. He was afraid that if action were brought in Federal Court on any of these cases, the person who had neglected to perform his engagement could not be compelled to do so, for support of ministers or place of worship might be construed into a religious establishment.<sup>9</sup> Another member of the House stated that by the Charter in Rhode Island, no religion could be established and "the people were enjoying the fruits of it." He hoped the amendment could be worded in such a way as to secure the rights of conscience but not to patronize

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<sup>5</sup>Ibid.

<sup>6</sup>Ibid.

<sup>7</sup>Ibid.

<sup>8</sup>Ibid.

<sup>9</sup>Ibid.

those who professed no religion at all.<sup>10</sup> Madison suggested inserting the word "national" before "religion." Gerry objected strenuously to this because this implied a national government rather than a federal government.<sup>11</sup> Another gentleman suggested that it be worded: "Congress shall make no laws ..." <sup>12</sup>

The motion was passed 31 to 20.

The rest of the amendments were debated and on August 18th the following was adopted by the House of Representatives:

3. Congress shall make no law establishing religion, or prohibiting free exercise thereof; nor shall the rights of conscience be infringed ...<sup>13</sup>

In the Senate a motion was made to strike "religion ... thereof" and to substitute "one religious sect or society in preference to others." This motion failed. A motion to reconsider then prevailed, and a motion to strike "3" altogether was made; this, too, was defeated. Finally the words "nor shall the rights of conscience be infringed" were stricken, and the article agreed to.<sup>14</sup>

Twelve amendments were submitted to the states for ratification on September 25, 1789; of these, ten were ratified and the first two were rejected.<sup>15</sup> The amendments went into effect December of 1791, when Virginia, the eleventh state, gave its approval. Connecticut, Georgia, and Massachusetts did not formally ratify the Bill of Rights until 1941 as part of the one hundred and fiftieth anniversary celebration of the birth of the Bill of Rights.

School children for generations have been nurtured on the story that a few courageous men by their insistence on a Bill of Rights created and

<sup>10</sup>Ibid.

<sup>11</sup>Ibid., p.138.

<sup>12</sup>Ibid.

<sup>13</sup>History of Congress, p.152.

<sup>14</sup>Ibid.

<sup>15</sup>Elliot I, 375.

preserved religious liberty for all time.<sup>16</sup> As a matter of fact, the main battle for religious freedom had already taken place in the States, and it was not the intent of the delegates at the ratifying conventions nor the men of the First Congress to enlarge upon their religious rights, but rather to protect from the encroachment of the central government those rights they already had. The Constitution, by its silence, left the power to legislate regarding religion to the states; most of the states had already indicated through their own fundamental laws that freedom of conscience was an "inalienable right" dependent on a higher authority and not subject to governmental interference. The First Amendment of the Bill of Rights was an expression of this belief.

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<sup>16</sup>In retrospect, this may be true; today it is the Federal Government which is the protector of the inalienable rights of man, and it is fortunate for us that there was an insistence on a Bill of Rights.

## Chapter V

### SUMMATION

The Puritans who settled Plymouth and Massachusetts migrated for the sake of freedom of conscience, but it was their own conscience they were concerned with - the freedom to establish a monopoly of their own religion. It was men like Roger Williams and William Penn who recognized the obligation of toleration as well as the right of choice. They recognized the right of others to be different and started the American tradition of "peaceful co-existence" among religious sects. The proprietary colonies seeking population and trade rather than religious freedom also moved towards toleration. The variety of peoples and beliefs in Pennsylvania, New York, Maryland, and the Carolinas worked for tolerance on practical grounds. The age of enlightenment with its liberal thought and the Great Awakening with the resultant multiplicity of sects also fostered the spirit of toleration. One writer describing religious freedom in the Colonial period said, "Although the cornerstones ... had not yet been laid, the foundations were being excavated."<sup>1</sup> By the time of the Revolution, tolerance was almost universal in the Colonies.

What did American independence mean for religious liberty? Religious liberty is not an isolated reality; it exists and is inseparable from measures of liberty and independence, freedom from authority, and respect for

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<sup>1</sup>Joseph L. Blau, Cornerstones of Religious Freedom in America (Boston: The Beacon Press, 1950), p.35.



the worth and dignity of man. The doctrine of the "unalienable rights of man" was the guiding star of the Revolution. It was these rights which were articulated and codified by the people in the fifteen years from the Declaration of Independence to the Bill of Rights.<sup>2</sup>

A study of these references to religion suggests that a consensus had been reached: religion was a private matter between man and his God and not the concern of government; freedom of conscience was one of the inalienable rights of man; that all men have an equal, natural and unalienable right to the free exercise of their religion, without compulsion or restraint; and all religious sects are entitled to equal treatment from the government. Perhaps the general attitude can best be summed up as "live and let live." The philosophy of laissez-faire applied to religion.

There is no doubt that the people of the new nation were a religious people. Their documents abound with references to their debt and their gratitude to the Creator. By and large, their religious feeling was a personal one, with definite opposition to outside compulsion of any sort. No church should be established, no man should be forced to support a church (even in those states which attempted to establish churches, a man could support the church of his choice), no clergyman could hold state office while practicing his pastoral functions. Time and time again, conventions were assured that because of the diversity and multiplicity of sects, no one denomination was strong enough to establish itself as an official church.

There was also general agreement that morality and piety are necessary ingredients of good government, and considerable concern that "Jews, infidels,

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<sup>2</sup>For an excellent summary of the actual practice in the states at the time of the Constitution, see M. Searle Bates, Religious Liberty: an Inquiry (New York: International Missionary Council, 1945), p.215.

papists and mohametans" might not be moral or pious enough to hold office.<sup>3</sup> But they also realized that if they restricted the rights of one denomination, their own rights could also be restricted; they recognized the liberty of others in order to protect their own liberty. Most of the states did restrict the right to hold office because of religious belief, but this was the only civil disability which existed in any of the states, contrary to the situation which prevailed in most of the rest of the world. A man could vote, hold property, sue and be sued, appear as a witness, etc., regardless of his religious beliefs. In no other country was religious freedom so widespread.

The First Amendment left to the states the problem of freedom of conscience and the establishment of an official church. But the principles codified by the First Amendment had already been established in the states: they were an expression of the status quo. The new aspect of religious freedom which was added by the Constitution - the removal of civil disabilities because of religious belief - was passed in the Constitutional Convention without discussion, and adopted by the states almost as a matter of course. This was a departure from the practice of most of the states, but only South Carolina thought it sufficiently offensive to require amending. This final step for full religious liberty was accomplished, on the Federal level, without difficulty.

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<sup>3</sup>Despite constitutional provisions, North Carolina elected Catholic Thomas Burke to the Continental Congress, and elected him Governor in 1781, ibid., p.216.

## P A R T II

### Chapter I

#### THE ISSUE IS JOINED:

Are the views of the Revolutionary generation pertinent in resolving the complex freedom of religion issues which have been facing the Supreme Court in recent years? The Constitution and Bill of Rights represent the views of no single man but rather the compromises of many men. While the opinions of Jefferson and Madison on religion are enlightening, they are not part of the Constitution. An understanding of the history and background of the Constitutional period can allow the Court to better discern the Framers' intentions, but these intentions can and have been interpreted in diverse ways. The Constitution provides a broad frame of reference, not specific answers, for where the Constitution does provide answers, questions do not arise. Mr. Justice Cardozo said, "It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the court begins."<sup>1</sup> When the Establishment clause was first considered by the Supreme Court, the colors did clash. There was no index and no precedent to help the Court in its very serious business.

The purpose of this section of the study is to examine the "serious business" of the Supreme Court in its current interpretations of the religious clause of the First Amendment.

To the man in the street, it appeared that the furor over religion in the

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<sup>1</sup>Benjamin N. Cardozo, Nature of the Judicial Process, Yale University Press, New Haven, (1921), p.21.

schools began with the 1962 Regents' Prayer case; it did not. As a matter of fact, this case was the climax of a battle which has been waged in the state courts for over one hundred years, and in the United States Supreme Court since 1947. The current controversy over religious observances in the public schools is tied to the origins of the American public school, the history of religious controversy, and the extent and significance of religious observances in the schools prior to the 1962 ruling.

The first "public" schools in this country were the church-supported "town" schools of puritan New England, which gradually evolved into the free common school.<sup>2</sup> As the free common school grew, quarrels arose among the various Protestant sects as to the type of religious and moral teaching to be given in these schools. Although it was generally agreed among the sects that the schools would be secular institutions, they retained a distinctly Protestant - and puritan - flavor. The coming of both Catholic and Jewish immigrants in the last half of the 19th Century, not only changed the religious complexion of the country but also brought with it challenges to the Protestant features of public education.<sup>3</sup>

Every state has in its Constitution a provision protecting religious liberty. In addition, twelve state constitutions specifically prohibit sectarian instruction in the public schools<sup>4</sup> and all but Vermont have constitutional provisions prohibiting the expenditure of public funds, or at least

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<sup>2</sup>See for example, provisions of Massachusetts and New Hampshire Constitutions, supra p.14. For a comprehensive review of the evolution of the public school, see Donald E. Boles, The Bible, Religion and Public Schools, (Ames, Iowa: The State University Press, 1963), pp.2-36; and Paul Blanchard, Religion and the Public Schools, (Boston: Beacon Press, 1963), pp. 1-27.

<sup>3</sup>Blanchard, op.cit. p.7.

<sup>4</sup>Joseph W. Harrison, "The Bible Education, and the Public Schools," 29 Tenn. L. Rev. 363, (1962) p.381; see also 45 ALR 2d 742 (1956).

school funds, for sectarian purposes.<sup>5</sup> The problem of what constitutes sectarian instruction, however, has been left to the courts. Eleven states require by statute the reading of the Bible in the public classroom; statutes in five states authorize, but do not require, reading from the Bible in the classroom, and various legal bodies in twenty-three states have upheld practices and laws requiring or authorizing this practice. On the other hand, in eleven states, legal bodies have declared Bible reading a sectarian practice and therefore forbidden by State and/or Federal Constitutions.

Those states which require or authorize Bible reading typically leave the choice of the version of the Bible to be used to the participants, and in recent years, have included excusal provisions; these statutes usually specify that the reading is to be "without comment" or explanation. (In actual practice this raises a problem; if the passage is not explained, many children do not understand it, and if it is explained, the explanation is likely to be the teacher's own personal sectarian interpretation.) Although the main focus in recent years has been on Bible reading and prayer, there are many other sectarian (i.e. Christian) practices in the public schools. Observance of religious holidays such as Christmas and Easter, Baccalaureate services, ministers at school assemblies, teachers in religious garb, religious art in the schools, religious tests in hiring teachers, and credit for church-sponsored Bible classes are a few of the more prevalent ones.

Although practices in regard to religion in the schools vary from one part of the country to another, those in the Texas public schools appear to

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<sup>5</sup>Boles, op. cit. p.43.

<sup>6</sup>Harrison, op. cit. p.381 et seq.; Boles, op. cit. pp.43-57.

present a typical picture.<sup>7</sup> A study revealed that 79% of the schools responding to a questionnaire had some form of Bible reading; 89% conducted prayer exercises; 99% had Christmas programs while only 11% observed the Jewish holidays. In fifteen school districts, ministers, priests, and nuns wearing clerical garb served as teachers in the public schools. Religious surveys of pupils were taken, and despite a Texas law stating that no school teaching personnel is to be asked "directly or indirectly" about his religious affiliation, 92% of all respondents indicated that an effort is made to determine whether or not the applicant has a religious affiliation. The author concludes that "at the present, the religious practices in the public schools of Texas seem less an aid for the education of all children than they are a support for (Protestant) sectarian purposes."

The Tennessee Supreme Court, in 1956, upheld a state statute requiring the daily reading of the Bible in the public schools.<sup>8</sup> The decision revealed that the King James version of the Bible was read in the classroom, that the Lord's Prayer was recited, and that hymns were frequently sung; it also revealed that teachers commonly asked students questions pertaining to the daily Bible reading. A survey in 1960<sup>9</sup> showed a very high level of compliance with the Knoxville, Tennessee Board of Education ruling requiring "Bible reading without comment." However, over two-thirds of the teachers "defined" certain words (definition of certain key words would certainly be considered interpretation and come within the realm of "comment") and some teachers indicated that they refused to excuse a student from his turn at reading the

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<sup>7</sup>Earl L. Humble, Religious Practices in Texas Public Schools: unpublished thesis, Southwestern Theological Seminary, Fort Worth, Texas, summarized; Pamphlet, Anti-Defamation League of B'nai B'rith, New York.

<sup>8</sup>Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

<sup>9</sup>Harrison, op.cit., p.395, et.seq.

Bible. The majority of teachers furnished the Bible to be used, although in some instances it was furnished by the school, by interested religious groups, or by Gideon International. The time spent varied from less than 5 minutes to 15 minutes. It is not without significance that although few of the teachers would abolish the program, "the overwhelming majority ... were rather conservative in their praise for the program."<sup>10</sup> In addition to Bible reading (which is the only religious activity authorized by statute) pupils participated in recitation of prayers, religious plays, Biblical map drawing, Bible memory drills, Chapel programs and other related activities.<sup>11</sup> In the majority of the schools, elementary pupils participated in various religious practices for the holidays, permission was granted for the distribution of religious literature by church groups, ministers were frequently invited to give talks which were either inspirational or descriptive of their religion; some schools had compulsory chapel attendance, and some had an elective course in Bible for which as much as one unit of credit was given.

There are interesting regional differences in the extent of religious practices in the schools throughout the country.<sup>12</sup> To the question "are home-room devotional services held in the schools of your system?", of all school systems, 68% of those in the East and 60% of those in the South had such devotionals in contrast with the Midwest with 6% and the West with only 2%. Bible reading was conducted in 67% of the Eastern schools, 76% of the Southern

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<sup>10</sup>Ibid., p.400

<sup>11</sup>Ibid., p.414 et. seq.

<sup>12</sup>Richard B. Dierenfield, Religion in American Public Schools, (Public Affairs Press, 1962). This work was introduced into the record of the House Judiciary Committee, Hearings Before the Committee on the Judiciary House of Representatives, 88th Congress, (U.S. Government Printing Office, Washington, D.C., 1964) on the proposed amendments to the Constitution relating to prayers and Bible reading in the Public Schools (hereinafter referred to as Hearings) and is quoted therefrom, pp.2414-2440.

schools, but in only 18% of Midwestern and 11% of Western schools.<sup>13</sup> Of those questioned concerning "released time" only 10% of the Southern schools had such a program, while 44% of Eastern, 29% of Western, and 27% of Midwestern schools participated.<sup>14</sup> Interestingly enough, when school administrators were asked their opinions of the released time program, there was much more uniformity of opinion - only a few percentage points separated the administrators in various parts of the country. 27% in the United States as a whole felt that this program was of no value, while only 12% felt it was of great value.<sup>15</sup>

The action of state courts in this area presents no similar geographic pattern, but rather reflects the diversity of American religious practices. The highest courts of eleven states have held that various state and local statutes requiring Bible reading in the schools do not violate state constitutions (Colorado, Georgia, Iowa, Kansas, Maine, Michigan, Nebraska, New Jersey, Ohio, Texas, Tennessee) and four have held Bible reading unconstitutional under state constitutions (Illinois, South Dakota, Washington, Wisconsin).<sup>16</sup> The first of these state cases was decided in 1854,<sup>17</sup> almost a hundred years before religious freedoms of the First Amendment were considered by the United States Supreme Court; obviously, the issue is not a new one!

In 1925. the Supreme Court held that the right of a parent to send his child to a private or parochial school was a property right under the Due

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<sup>13</sup>Hearings, p.2418.

<sup>14</sup>Ibid. p.2427.

<sup>15</sup>Ibid. p.2435.

<sup>16</sup>For a summary of these decisions, see Harrison, op.cit. pp.381-385; see also, Abington School District v. Schempp, p.374 U.S. 203 (1963); concurring opinion of Mr. Justice Brennan, p.26-.

<sup>17</sup>Donahoe v. Richards, 38 Me. 376, (1854).



Process clause of the Fourteenth Amendment<sup>18</sup> and in 1930, the Court permitted Louisiana to use state funds for text books for parochial elementary schools without even mentioning the First Amendment. This case introduced the "child benefit theory."<sup>19</sup> Mr. Justice Cardozo extended the application of the First Amendment to the states in the Cantwell case in 1940.<sup>20</sup> This decision, and subsequent "Jehovah's Witnesses cases" based on the Free Exercise Clause of the First Amendment,<sup>21</sup> served to define the broad outlines of the meaning of freedom of religion, thus paving the way for more conventional sects to claim protection from any kind of religious discrimination or establishment even when it was completely sanctioned by local law and local custom.

Abortive attempts were made to bring the "religion in the schools" issue before the Supreme Court, but it was not until 1962 that the opponents of Bible reading in the schools succeeded. In the meantime, the first major case involving the schools and religion decided under the Establishment clause of the First Amendment was the Everson<sup>22</sup> case in 1947. The Court held that a local ordinance authorized by New Jersey statute, providing for bus transportation for parochial school pupils was not an Establishment and therefore constitutional. The following year, an Illinois on-premises released-time<sup>23</sup> program was held to be an unconstitutional Establishment, while in 1952, the New York state program of off-premises released-time<sup>24</sup> was held

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<sup>18</sup>Pierce v. Society of Sisters, 281 U.S. 370, (1930).

<sup>19</sup>Cochran v. Louisiana, 281 v. U.S. 510, (1930).

<sup>20</sup>Cantwell v. Connecticut, 310 U.S. 296, (1940).

<sup>21</sup>Minersville v. Gobitis, 310 U.S. 586, (1940); West Virginia v. Barnette, 319 U.S. 624, (1943).

<sup>22</sup>Everson v. Board of Education of Ewing Township, 330 U.S. 1, (1947).

<sup>23</sup>McCullum v. Board of Education, 333 U.S. 203, (1948).

<sup>24</sup>Zorach v. Clausen, 343 U.S. 306, (1952).

constitutional.

Ten years later the controversial issue of prayers in the schools was finally considered by the Court. In the Engel<sup>25</sup> case, in finding the New York State Board of Regents' prayer an unconstitutional establishment, the Court stated "that it is not the business of government to compose and prescribe official prayers." In the heat of the controversy which followed the Court's holding in this case, the decision which really went to the heart of the matter was almost unnoticed. The Schempp<sup>26</sup> and Murray<sup>27</sup> cases, from Pennsylvania and Maryland, concerned the traditional "morning devotional," and held that reading the Bible and reciting the Lord's Prayer in the public tax-supported schools is clearly an unconstitutional establishment of religion.

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<sup>25</sup>Engel v. Vitale, 370 U.S. 421, (1962).

<sup>26</sup>Abington v. Schempp, op.cit.

<sup>27</sup>Murray v. Curlett, 374 U.S. 203, (1963), hereinafter referred to, together with above case, as Schempp.

## Chapter II

### VOX POPULI

The public reaction which followed the Engel case was swift, emotional, vehement, and perhaps inevitable in view of the political temper of the times. No Supreme Court decision since the school desegregation cases aroused so much emotion - condemnation of the Court and its decision appeared to be almost unanimous. Herbert Hoover called the decision a "disintegration of one of the most sacred American heritages,"<sup>1</sup> a South Carolina Congressman<sup>2</sup> said, "I know of nothing in my lifetime that could give more aid and comfort to Moscow than this bold, malicious, atheistic, and sacrilegious twist of this unpredictable group of uncontrolled despots." Senator Sam J. Ervin of North Carolina declared that "... the Supreme Court has held that God is unconstitutional and for that reason, the public schools must be segregated against Him?"<sup>3</sup> Representative George Andrews of Alabama said, "They put the negroes in the schools and now they have driven God out";<sup>4</sup> and former President Eisenhower, "I have always thought this Nation was essentially a religious one."<sup>5</sup>

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<sup>1</sup>TIME Magazine, July 6, 1962, p.8.

<sup>2</sup>L. Mendel Rivers, quoted in New York Times, July 6, 1962, p.10E.

<sup>3</sup>Ibid.

<sup>4</sup>New York Times, July 1, 1962. sec. 4, p.1.

<sup>5</sup>Ibid. For a summary of opinions - see Paul G. Kauper, "Prayer, Public Schools and the Supreme Court," 61 Mic. L.R. 1031, (1963) and Blanchard, op.cit. p.52 et.seq.

Cardinal Spellman commenced a blistering attack on the Court with "This decision strikes at the very heart of the Godly tradition in which America's children have for so long been raised."<sup>6</sup> Commented the New York Post in an editorial entitled "Prayer and Politics," "The indignation of the Catholic hierarchy is understandable. It is prompted, we suspect, not over the prohibition of a prayer which many churchmen would agree has little religious value, but by the potential impact of the decision on the aid-to-education battle."<sup>7</sup> Billy Graham deplored the Court's secularism - "The framers of our Constitution meant we were to have freedom of religion and not freedom from religion."<sup>8</sup> Bishop James A. Pike of the California Protestant Episcopal Diocese, issued a legal attack on the decision and immediately commenced a movement for a constitutional amendment.<sup>9</sup> The reaction of other Protestant churchmen was mixed and somewhat more moderate. The initial Methodist reaction was that the decision was an "obvious blow to religious freedom," and "in effect makes secularism the national religion." A few days later, the National Council of Churches, through its Director of Religious Liberty, asserted "Many Christians will welcome this decision. It protects the religious rights of minorities and guards against the development of 'public school religion' which is neither Christianity or Judaism, but something less than either."<sup>10</sup> The American Baptists tended to be favorable to the decision, while the Unitarians expressed unequivocal approval. The Supreme Court received strong support from the 1963 General Assembly of the United Presbyterian Church which opposed Bible reading and prayer in the public

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<sup>6</sup> New York Times, June 26, 1962, p.1.

<sup>7</sup> Summarized in New York Times, June 29, 1962.

<sup>8</sup> New York Times, July 1, 1962, sec.4, p.1.

<sup>9</sup> Blanchard, op.cit. pp.171-173.

<sup>10</sup> Ibid., p.65.

classrooms, which declared, "We Presbyterians wish to live, teach, and evangelize in a political order in which no church will dominate the civil authorities or be dominated by them."<sup>11</sup>

The Jewish Community has been almost unanimous in its support of the Court's position. The American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith were among the organizations which filed amicus briefs in the Engel case. The Synagogue Council of America, through its president, Dr. Julius Marks, stated, "It has been our belief that prayer of any sort should be fostered in the home, church, and synagogue and that public institutions such as the public school should be free of such sectarian practices. We have further held to the belief that prayer of 'common core' can only lead to a watering down of all that is spiritually meaningful in every religious faith."<sup>12</sup>

The Congressional critics of the Court were given a boost by the Conference of American Governors' meeting at Hershey, Pennsylvania in July of 1962 which passed an almost unanimous resolution that the right to have non-denominational prayers in the public schools be restored by Constitutional amendment - Governor Rockefeller was the only governor who did not vote, on the ground that he needed more time to study the matter. For days following the decisions, the Letters to the Editor columns were filled with denunciations of the Court. The impression gained from reading the periodicals was of virtually unanimous opposition to the Court and its holding. Gradually, however, sentiment began to turn, as one religious leader after another came out in favor of the decision.

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<sup>11</sup>Ibid.

<sup>12</sup>Reprinted by Anti-Defamation League of B'nai B'rith, New York, January, 1963, pamphlet "Religious Spokesmen in Support of the U.S. Supreme Court Decision on Prayer in the Public Schools."

The reaction to the Schempp and Murray decision of 1963 was almost peaceful compared to the storm after Engel - although the sentiment against the decision was practically the same, the decision itself received almost no comment in the public press - these decisions entered the public scene like the proverbial lamb. For one thing, the decision went almost unnoticed because it was handed down in June, 1963 when the nation was in the midst of a civil rights crisis - the news media were full of the impending march on Washington by Negro civil rights workers; for another, the interdenominational character of the decision was emphasized by the fact that the opinion of the Court was assigned to Justice Tom Clark, a prominent Presbyterian layman, while concurring opinions were written by Goldberg, the only Jew on the Court, and Brennan, the only Catholic. In addition, the relatively narrow decision in Engel not only acted as a buffer, but made the far more reaching Schempp decision a foregone conclusion.

A United Press International survey regarding the opening day of school, September, 1963, showed that despite the ban against religious devotions, thousands of children began their first day of school with Bible reading and/or prayer<sup>13</sup> and Associated Press concluded that most schools continued their former practices. The New York Times, immediately after the Schempp decision, quoted the State Superintendent of Education from Columbia, South Carolina to the effect that the state intended to ignore the ruling since South Carolina had no law on the subject.<sup>14</sup> Alabama was openly defiant, Governor George Wallace said, "We don't care what the Supreme Court said"; and two California legislatures introduced a bill to prohibit instruction in the Darwinian theory since "if it is illegal to present religion in the schools, it must be equally

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<sup>13</sup>Doak, op.cit. p.23.

<sup>14</sup>June 18, 1963, p.29.

illegal to present anti-religious doctrines."<sup>15</sup> Arkansas and Delaware still required prayer, other states called for moments of meditation, inspirational reading, or a course of study dealing with the Bible.<sup>16</sup> The same survey showed that most of the schools in the West (where the practice was not widespread) were abiding by the decision, but in New Jersey, the community of Hawthorne<sup>17</sup> challenged the 1963 Supreme Court's ruling, and according to a school principal in one metropolitan area community, "the decision is not enforced throughout the state."<sup>18</sup>

The most drastic reaction of all came from Congress. Over 148 Resolutions proposing Amendments to the Constitution were submitted by 115 Congressmen.<sup>19</sup> The resolutions which were referred to Emanuel Celler's House Committee on the Judiciary had as their main objective to overrule the Supreme Court - to put "God back into the schools." Typical of these resolutions was H. J. Res. 693, 88th Congress First Session<sup>20</sup> introduced by Frank J. Becker, Republican from New York:

Sec. 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or Biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

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<sup>15</sup>Doak, op.cit. p.24.

<sup>16</sup>Ibid., p.23. See Frank J. Sorauf, "Zorach v. Clausen: The Impact of a Supreme Court Decision" 53 Am. Pol. Sci. Rev. 777 (1959) for a review of effects and compliance with that decision.

<sup>17</sup>New York Times, January 16, 1965, p.1. The American Legion of Hawthorne planned to distribute, through the P.T.A., book covers bearing a non-denominational prayer. The President of the Board of Education said there was no legal reason why pupils could not read prayer to themselves every morning.

<sup>18</sup>This information was obtained through a personal interview on November 16, 1964.

<sup>19</sup>Hearings. pp.iii-vi.

<sup>20</sup>Ibid., p.22. For text of other resolutions, see pp.1-59 of Hearings.

Sec. 2. Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

Sec. 3. Nothing in this article shall constitute an establishment of religion.

The testimony at the Hearings of these resolutions, held in April and May of 1964, fills 2774 pages in three volumes. At least 73 Congressmen testified, almost all in favor of some kind of constitutional amendment. So overwhelming did congressional sentiment appear to be, that when Representative B. F. Sisk, (Democrat, California) spoke out against any amendment, Chairman Celler commented that "you are very much like a breath of cool air in the heat of summer."<sup>21</sup> The list of witnesses reads like the roster of "who's who in American religion" - church leaders from every major faith testified before the Committee - the great majority of them opposed to any amendment! The proposal to change the First Amendment, as reflected in the mail to the committee, was more agreeable to the populace at large than it was to leadership groups, in fact, one witness referred to the church leaders as "generals without armies."<sup>22</sup> Constitutional lawyers from the nation's leading law schools have rarely been in such complete agreement. In addition to the testimony of such prominent Supreme Court critics as Paul Freund, Harvard; Philip Kurland, University of Chicago; Dean Jefferson B. Fordham, University of Pennsylvania; Dean Willard Heckel, Rutgers University; Wilber G. Katz, University of Wisconsin; and Paul G. Kauper, University of Michigan; letters and prepared statements were submitted by a great many more experts in the Constitutional law field, including a statement signed by 223 constitutional lawyers. Represented in this group were faculty members and

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<sup>21</sup>Ibid., p.533.

<sup>22</sup>George LaNove. Hearings, p.2442.



deans of law schools all over the country.<sup>23</sup> The scholars were unanimous in their opposition to an amendment to the Constitution. In addition, such organizations as the Anti-Defamation League, the American Civil Liberties Union, and the National Council of Churches were strongly opposed to any change in the First Amendment.<sup>24</sup>

In view of the impressive array of opponents to the Becker Amendment, one might well ask who was in favor of the amendment. A great many private citizens wrote to the committee asking that prayers be "put back in the schools." Individual congregations, and individual ministers from all over the country, Veterans' organizations, Billy Graham, Cardinal Spellman, and Governor George Wallace of Alabama all defended the "right of little children to pray."<sup>25</sup> Fortunately for the integrity of the First Amendment, the proposal was never reported out of Committee.<sup>26</sup> This was due in a large measure to the skillful and diplomatic handling of the Hearings by Chairman Celler, and to the fact that those who were in favor of an amendment were unable to agree on wording which would nullify the Supreme Court's decision without opening Pandora's box to a host of other problems. Who would prescribe the prayers? How much time could be devoted to prayer? Is it possible to write a non-denominational prayer? What recourse have those who are offended by the prayer? What effect would such an amendment have on already existing state prohibitions?

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<sup>23</sup>Ibid., p.2483.

<sup>24</sup>Hearings, p.594.

<sup>25</sup>Hearings, p.211 et.seq. and p.577 et.seq. The pros and cons of the issue are fairly well brought out in the testimony and questioning of Congressman Becker, the most active proponent of the measure.

<sup>26</sup>The House did manage to show its resentment of the Supreme Court by rejecting the Senate's proposed salary increase for the Justices, see William May, "Court Foes Have Field Day," Newark Sunday News, March 22, 1965, sec. 2, p.C3.

The popular opposition to the Court's decision can be summed up in three categories; 1. those who look for any opportunity to discredit the Court because of the Court's recent activist role - i.e. Southerners who are still smarting under the Segregation decisions, 2. those who "make political hay" out of being in favor of God and against the Court, and 3. those sincere people who are genuinely concerned with the "moral decay" of our society and feel that the Supreme Court has taken one more step in that direction. Most would like to return to the idyllic days of the status ante-quo - which, in view of the long history of controversy in this area, is somewhat like trying to sweep the whole issue under the rug and out of sight.<sup>27</sup>

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<sup>27</sup>As this is being written, Senator Everett Dirksen's attempt to push a similar amendment through the Senate failed. The Senate rejected the "Dirksen Amendment" by a vote of 49 to 37, nine votes short of the necessary two-thirds majority. New York Times, September 21, 1966, p.1.

### Chapter III

#### OF SCHOOL BUSES AND RELEASED TIME

Just what were these cases which aroused such universal public opposition? Although the Engel, Schempp and Murray cases were the immediate reason for the public outcry, they must be considered with several other equally controversial cases which laid the groundwork and established the legal theories on which these cases are based. The first of these precedent-making cases was the New Jersey School bus case in 1947.<sup>1</sup> Under a New Jersey statute which authorized local school boards to make contracts for the transportation of children to and from schools other than private schools operated for profit, the township authorized reimbursement of bus fares to parents of children in the public schools and in the Catholic parochial schools. This payment of public funds was challenged by a district taxpayer as being a violation of the First Amendment of the Federal Constitution. The New Jersey court of original jurisdiction held that the statute in question was a violation of the New Jersey Constitution,<sup>2</sup> while the New Jersey Court of Errors and Appeals reversed the Trial Court saying that it violated neither the Federal nor the State Constitution.<sup>3</sup> As a case of first impression, a great deal of interest was aroused - the American Civil Liberties Union appeared as amicus curiae for Everson, while the Attorneys -

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<sup>1</sup>Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, (1947).

<sup>2</sup>39A. 2d 75 (1944).

<sup>3</sup>44A. 2d 333 (1945).

General of several states and the National Council of Catholic Men appeared for the school board. Mr. Justice Black, who wrote the majority opinion, was joined by Chief Justice Vinson and Justices Reed, Douglas and Murphy.

Mr. Justice Black began his analysis of the problem with a comprehensive discussion of the background of the First Amendment, with special attention to Madison's Remonstrance and Jefferson's "wall of separation," and with particular emphasis on the feeling of the Founding Fathers that no individual should be taxed to support a religious institution of any kind. He then gave his now-famous definition of the Establishment clause.

The Establishment clause means at least this:<sup>4</sup>

1. Neither state nor federal government can set up a church.
2. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.<sup>5</sup>
3. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess belief or disbelief in any religion.
4. No person can be punished for entertaining or professing religious beliefs or disbeliefs or for church attendance or non-attendance.
5. No tax in any amount can be levied to support any religious activities or institutions - whatever form they may adopt, teach or practice.
6. Neither state nor federal government can openly or secretly participate in affairs of any religious organization or groups or vice versa.

"In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation' between church and state."<sup>6</sup> One is

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<sup>4</sup>Everson, op.cit., pp.15-16.

<sup>5</sup>The local ordinance applied only to Catholic parochial schools, a fact which was evidently not considered significant by the majority, however, this point is raised by Justice Jackson in his dissent at p.20 and Rutledge, p.62.

<sup>6</sup>Everson, op.cit., pp.15-16.

mildly astonished to read Justice Black's conclusion - in view of this broad language - that "the wall must be kept high and impregnable. We would not approve the slightest breach. New Jersey has not breached it here."<sup>7</sup>

In upholding the school board, the majority compared providing transportation to providing services of police and fire which is, of course, extended to all; "the state contributes no money to the church schools, it does not support them,"<sup>8</sup> "We must be careful in protecting the citizens of New Jersey against state established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all citizens without regard to their religious beliefs."<sup>9</sup> Thus the child-benefit theory appeared in full bloom. The benefit of the legislation is for the child; any benefit which the church may receive is only incidental.

Four Justices dissented. Justice Jackson, joined by Justice Frankfurter, went into considerable detail to show that the parochial school is a vital part of the Catholic church's program; attendance is made compulsory, and the curriculum is prescribed by the diocese. He was very critical of the majority, and easily distinguished fire and police protection from the furnishing of bus transportation - in the later case he pointed out, the test by which the beneficiaries of the expenditure were chosen is essentially a religious one; ignoring this religious test is the basic fallacy of the majority.<sup>10</sup> Freedom of religion is set forth in absolute terms. "This is not, therefore, just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it

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<sup>7</sup> Ibid., p.18. Since so much of what is said above is completely unnecessary to the result actually reached by the Court, one cannot help but feel that what started out to be a reversal, became in the course of deliberations, an affirmance - did one of the Justices switch sides?

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., p.16.

<sup>10</sup> Ibid., p.25.

only in degree; and it is the first step in that direction."<sup>11</sup>

The second dissent, by Justice Rutledge, in which he was joined by Justice Burton as well as Justices Jackson and Frankfurter, is believed by many writers to be the classic statement of the problem, and the view that will ultimately prevail. He, too, relied on history, and incorporated Madison's views into his interpretation of the First Amendment. He is concerned, however, not so much with the intentions of the Founding Fathers regarding specific areas involving religion, but rather with the overall purpose of the First Amendment.<sup>12</sup> The purpose of the First Amendment was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Transportation is an integral part of schooling which cannot be separated from the paying of tuition or teachers' salaries or books, the benefit to the church is real and not incidental.<sup>13</sup> According to Justice Rutledge, two great drives are constantly in motion to abridge, in the name of education, the complete division of religious and civil authority; one to introduce religious education and observances into the public schools and the other to obtain public funds for aid and support of various private religious schools - "in my opinion, both avenues were closed by the Constitution. Neither should be opened by this Court."<sup>14</sup>

The following year, the court was almost unanimous in its decision in the McCullum case.<sup>15</sup> The plaintiff, a resident, taxpayer, and parent of a child attending the school in question, objected to the Illinois "released time" program. The program, sponsored by the various religious denominations of the

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<sup>11</sup>Ibid., p.57.

<sup>13</sup>Ibid., p.48.

<sup>12</sup>Ibid., pp.31-44.

<sup>14</sup>Ibid., p.63.

<sup>15</sup>McCullum v. Board of Education, 333 U.S. 203, (1948).

community, consisted of weekly religious teachings in the school during school hours. Participation was voluntary, and those who did not participate in religious instruction had their regular secular studies.<sup>16</sup> In an eight to one decision, this practice was held to be an unconstitutional Establishment. Justice Black again wrote the opinion of the Court. After reviewing the facts, he found that "this is beyond question, the utilization of tax-established and tax-supported public school system to aid religious groups to spread their faith,"<sup>17</sup> the state provides pupils for religious classes through the use of the state's compulsory school machinery - this constitutes an establishment "as we interpreted it in Everson."<sup>18</sup>

Justice Frankfurter, concurring in the decision and speaking for the dissenters in Everson,<sup>19</sup> reviewed the history of public education and religious instruction. Although the separation principle was established early in the 1860's, community leaders concerned with giving children some religious instruction tried to bring this instruction in during the child's "working day." By 1914, this practice had evolved into "released time."<sup>20</sup> In Illinois, the fact that the power of the school board had not been used to discriminate between religions was not material; the fact that the child was offered an alternative reduced constraint, but did not eliminate the influence of the school in matters sacred to conscience and outside the school's domain.<sup>21</sup> Frankfurter

<sup>16</sup>Ibid., pp.205-206.

<sup>17</sup>Ibid., p.210.

<sup>18</sup>Ibid.

<sup>19</sup>Justices Rutledge and Burton also concurred in the Court's opinion.  
Ibid., p.213.

<sup>20</sup>Ibid., pp.213-224.

<sup>21</sup>Ibid., p.227.

stated that if the child were "willing", other time could be found - dismissed time could be utilized,<sup>22</sup> but in the present set of facts, the momentum of the whole school atmosphere and school planning was put behind religious instruction.<sup>23</sup> The plaintiff asked the Court to "prohibit all instruction in and teaching of religious education in public schools" - this the Court said it could not do, because there are many areas of secular study which involve the discussion of religion - the study of the Reformation, for example.<sup>24</sup> Mr. Justice Jackson, in a separate concurring opinion, stated that the "religious clauses here go beyond the permissible," however, the plaintiff asks for more than she is entitled to, and the Court has not set standards that the states can follow in the future.<sup>25</sup>

Justice Reed, the only dissenter, agreed with the general principles set forth by the majority, but not with their conclusions.<sup>26</sup> He, too, cited history to bolster his case - Jefferson's establishment of centers of religions at the University of Virginia.<sup>27</sup> Reed distinguished an Illinois case<sup>28</sup> which struck down Bible reading and prayer as being worship services and activities which were "ceremonial and compulsory" - he found the practices at issue

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<sup>22</sup>Released time - children who participate are released to attend religious instructions, others are kept in their secular classes; Dismissed time - all children are freed from classes, those who so desire may attend religious instructions, the others are free to do as they wish.

<sup>23</sup>McCullum, op.cit., p.230.

<sup>24</sup>Ibid., pp.234-235.

<sup>25</sup>Ibid., p.237.

<sup>26</sup>Ibid., p.239.

<sup>27</sup>Ibid., p.245. He neglected to mention that Jefferson also opposed religious education in the public schools - quoted in Blanchard, op.cit. p.13.

<sup>28</sup>Ring v. Board of Education, 71 NE 2d 161 (1947).



"voluntary and educational."<sup>29</sup> He further warned, "This Court cannot be too cautious in upsetting practices imbedded in our society by many years of experience. ... The history of the past practices is determinative of the meaning of a Constitutional clause."<sup>30</sup>

The attack on the Court following the McCollum decision was only slightly less vehement than that which followed the more recent Engel case, according to one writer, this led to distinguishing the Zorach case on "gossamer thin grounds."<sup>31</sup> The facts in the Zorach case<sup>32</sup> were similar to those of McCollum with one difference which the court found significant. Several New York City taxpayers and parents objected to that City's "released time" program. Public school pupils with parental permission were excused from school for one hour a week, during school hours, to attend religious centers for religious instruction, attendance was kept and reports were sent to the school by the religious institution. Those who did not participate remained in the classroom, and were given, according to the testimony, "busy work."<sup>33</sup> Justice Douglas, speaking for the Court, in upholding the program, found that it "involves neither religious instruction in the classroom, nor expenditure of public funds" - all costs are paid by the religious institutions.<sup>34</sup> Although plaintiffs claim that the weight and influence of the school are put behind the program - the teachers police the program, classroom activities halt, and the school is used as a crutch for the church,<sup>35</sup> - Douglas disagreed. He found no evidence of coercion; the public schools merely accomodated religion. It was in this context that

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<sup>29</sup>McCollum, op.cit., p.253.

<sup>30</sup>Ibid., p.256.

<sup>31</sup>Kurland, "Full of Sound and Fury Signifying ..." op.cit., p.4.

<sup>32</sup>Zorach v. Clausen, 343 U.S. 306, (1952).

<sup>33</sup>Ibid., p.308.

<sup>34</sup>Ibid., pp.308-9.

<sup>35</sup>Ibid., p.309.

his now-famous dicta was uttered, "We are a religious people whose institutions presuppose a Supreme Being."<sup>36</sup>

Mr. Justice Black, dissenting, finds no difference between McCullum and the instant case - the sole question is whether New York can use its compulsory education laws to help religious sects to get attendants presumably too unenthusiastic to go unless moved by the pressure of state machinery.<sup>37</sup> Free choice is removed by operation of the state; the state makes religious sects the beneficiaries of its power to compel children to attend secular schools.<sup>38</sup> "In considering whether the state has entered this forbidden field the question is not whether it has entered too far, but whether it has entered at all."<sup>39</sup> "The government should not under cover of the soft euphemism of 'cooperation' steal into the sacred area of religious choice."<sup>40</sup> The First Amendment has lost much if the religious follower and athiest alike are no longer judicially regarded as entitled to equal justice under law. He implied that the Court was bowing to public pressure, "I am aware that our McCullum decision on separation of church and state has been subject to a most searching examination, ... Probably fewer opinions in recent years have attracted more attention or stirred more debate."<sup>41</sup> He added, in reply to Douglas, that because we were a religious people that the First Amendment was adopted.<sup>42</sup>

Jackson, in his dissent, called the distinction between McCullum and Zorach "trivial almost to the point of cynicism, magnifying non-essential details and disparaging the compulsion which is the underlying reason for the statute's invalidity."<sup>43</sup> The truant officer, in effect, compelled attendance while the school served as a temporary jail for the pupils who did not wish

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<sup>36</sup>Ibid., p.313.

<sup>37</sup>Ibid., p.318.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid.

<sup>40</sup>Ibid., p.320.

<sup>41</sup>Ibid., p.317.

<sup>42</sup>Ibid., p.319.

<sup>43</sup>Ibid., p.325.

to go to church,<sup>44</sup> and Jackson admonished his "evangelistic brethren" not to confuse objection to compulsion with objection to religion.<sup>45</sup> Frankfurter, in still a third dissent, distinguished released and dismissed time. In the instant case, formalized religious instruction was substituted for other school activity, and there was coercion by the very nature of the system.<sup>46</sup> He added that principles were disregarded, but fortunately not disavowed in this case.<sup>47</sup>

In the same term, the Court handed down the Doremus decision<sup>48</sup> in which the Court ducked the issue which was later presented in the Schempp and Murray cases. An action for declaratory judgment was brought by local taxpayers and the parent of a child who had graduated from the public schools in the course of the litigation, to interpret a New Jersey statute which read in part that the public schools shall hold "no religious service ... except" the reading of five verses from the Old Testament (without comment) and the recitation of the Lord's Prayer. New Jersey's highest court upheld the constitutionality of the statute and an appeal was filed. The American Civil Liberties Union and The American Jewish Congress filed amicus briefs on behalf of Doremus, while the Attorneys - General of Pennsylvania and New York appeared for the Board of Education. In a six-to-three decision, the appeal was dismissed. Justice Jackson, speaking for the majority, and citing Mellon v. Frothingham<sup>49</sup> stated that a taxpayer's suit must be a "pocket book" suit and since there was no showing that Bible reading adds to taxes, the rule of di minimus applied. It was conceded that the child had graduated, therefore, no issue of damage to the child was raised. It is settled law that the Supreme Court will only consider

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<sup>44</sup>Ibid., p.324.

<sup>46</sup>Ibid., p.321.

<sup>45</sup>Ibid.

<sup>47</sup>Ibid., p.322.

<sup>48</sup>Doremus v. Board of Education, 342 U.S. 429, (1952).

<sup>49</sup>Mellon v. Frothingham, 262 U.S. 447, (1923).

a "case or controversy," which does not exist here.<sup>50</sup> Douglas, in a strong dissent, joined by Reed and Burton, felt that the case deserved a hearing on the merits, "where the clash of interests is as strong as it is here, it is odd indeed to hold there is no case or controversy within the meaning of Article III. (2) of the Constitution ... the issue is not feigned, the suit is not collusive, the mismanagement of the school system that is alleged is clear and plain."<sup>51</sup> The Court was obviously avoiding the issue, which was not finally decided until the Engel and Schempp cases a decade later - quite possibly for fear that the decision would be "wrong."

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<sup>50</sup> Doremus, op.cit., p.436.

<sup>51</sup> Ibid., pp.435-436.

## Chapter IV

### PRAYERS AND BIBLE READING

In 1951, the New York State Board of Regents, after considerable discussion about the extent and character of "moral training" in the New York schools,<sup>1</sup> issued a document called "Statement on Moral and Spiritual Training in the Schools" for the guidance of all state education officials.<sup>2</sup> Included in this document was the now infamous "non-denominational" prayer composed - after laborious discussion - by religious leaders of most of the denominations represented in New York, and obviously intended to offend none. It was accompanied by a further statement from the Regents that "belief in and dependence upon Almighty God was the very cornerstone upon which our founding fathers builded." Theoretically, the use of this prayer was made voluntary at all levels but often the machinery for excusing children was vague or entirely missing.<sup>3</sup> The Board of Education of New Hyde Park, acting in its official capacity under this policy statement, directed the School district's principals to have said aloud by each class, in the presence of the teacher at the beginning of every school day, the following prayer:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."<sup>4</sup>

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<sup>1</sup>Engel v. Vitale, 370 U.S. 421 (1962), p.422.

<sup>2</sup>For text of statement, see Hearings, pp.634-5; for an account of the religious and political struggle that preceded this document, see Boles, op.cit., p.177, and Blanchard, op.cit., pp.33-35.

<sup>3</sup>Blanchard, p.35.

<sup>4</sup>Engel, op.cit., p.422.

Soon after this prayer was adopted by the School Board, ten parent-taxpayers brought action in the New York Courts claiming that the use of the prayer was contrary to their beliefs, religions, or religious practices, and that the action of the Regents and the School Board constituted an Establishment of religion in violation of the Federal Constitution.<sup>5</sup> Thus began the Engel case's long legal journey to the United States Supreme Court. The New York Supreme Court (the trial Court)<sup>6</sup> rejected the petitioner's claims, but made it clear that procedures and safeguards which would guarantee the plaintiffs' right of Free Exercise must be adopted. This view was affirmed by the New York Court of Appeals in a three-two decision.<sup>7</sup>

On appeal to the United States Supreme Court, Justice Black, speaking for an almost unanimous Court,<sup>8</sup> summarily rejected the contention of the state courts. "We think that by using its public school system to encourage the recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment clause."<sup>9</sup> Black cited no cases, instead he relied on history - the history of the controversy over the Book of Common Prayer, and the history of the adoption of the First Amendment. "There can, of course, be no doubt that the daily invocation of God's blessing is a religious activity - the trial court so found, and the Board of Regents, in its amicus brief, conceded the religious nature of prayer but seeks to distinguish this prayer because it is based on our spiritual heritage."<sup>10</sup> The fact that the prayer is "denominationally neutral" and voluntary, does not

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<sup>5</sup>Ibid. p.423.

<sup>6</sup>191 N.Y.S. 2d 453, (1959).

<sup>7</sup>176 N.E. 2d. 579 (1961).

<sup>8</sup>The decision was six-to-one, with neither Justices Frankfurter or White participating.

<sup>9</sup>Engel, op.cit., p.424.

<sup>10</sup>Ibid., p.425.

"serve to free it from the limitations of the Establishment clause as it might from the Free Exercise clause ... ." <sup>11</sup> "The Establishment clause, unlike the Free Exercise clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." <sup>12</sup> Direct coercion, however, is not necessary, for, when the "... power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially-approved religion is plain." <sup>13</sup> In short, "it is neither irreligious or sacreligious to say that each separate government in this country should stay out of the business of writing or sanc-  
tioning official prayers and leave that purely religious function to the people's religious leaders." (emphasis supplied) <sup>14</sup> In a footnote that was frequently overlooked in the first furor over the decision, Black distinguished between patriotic and ceremonial exercises which contain references to the Deity, and the "unquestioned religious exercises which the State of New York had sponsored in this instance." <sup>15</sup>

Black confined his decision to the issue of writing and sanctioning official prayers. For Justice Douglas, concurring, "the point for decision is whether the government can constitutionally finance a religious exercise." <sup>16</sup> He was not convinced that authorizing the prayer is to "establish" religion in the strictly historical meaning of those words. A religion is not established in the usual sense by merely letting those who choose to do so say a prayer that the public school teacher leads. Yet, once a government finances a

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<sup>11</sup> Ibid., p.430.

<sup>12</sup> Ibid., p.430.

<sup>13</sup> Ibid., p.431.

<sup>14</sup> Ibid., p.435.

<sup>15</sup> Ibid., footnote 21.

<sup>16</sup> Ibid., p.437.

religious exercise, it inserts a divisive influence into our communities.<sup>17</sup> In his sweeping concurrence, he reaffirmed his famous "we are a religious people ..." dictum of Zorach, cited the dissent in McGowan<sup>18</sup> that the government is "to have no interest in theology or ritual" and repudiated his stand in the Everson case.<sup>19</sup> He implied that a whole series of religious involvements are unconstitutional, including such diverse American "institutions" as the opening prayers in Congress and the Courts, tax exemptions and deductions, aid to denominational colleges through the G. I. Bill, etc.<sup>20</sup> He also made it clear that he found no element of coercion present in the instant case (except perhaps on the teacher, and no teacher is complaining).<sup>21</sup> In Douglas' view, any financial involvement by the government is an unconstitutional establishment. He cited the Rutledge-Everson dissent as durable First Amendment philosophy - public money devoted to payment of religious costs, educational or other, brings quest for more.

The lone dissenter, Mr. Justice Stewart, discounted the relevancy of the history cited by the majority. What was at issue to him was "not the history of the established church in 16th Century England or 18th Century America, but the history of the religious tradition of our people. ..." <sup>22</sup> In a lengthy footnote, he cited numerous examples of Presidents and other high officials who, throughout history, have invoked the aid of the Deity,<sup>23</sup> - and concluded that these actions and practices do not constitute the establishment of religion.<sup>24</sup> There was no finding that New York had interfered with anyone's Free Exercise of religion (and implied that his decision would be different if there had been such a finding).

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<sup>17</sup> Ibid., p.442.

<sup>18</sup> McGowan v. Maryland, 366 U.S. 420, (1961), p.563. see appendix herein for summary of decision.

<sup>19</sup> Engel, op.cit., pp.442-443.

<sup>21</sup> Ibid., p.438.

<sup>23</sup> Ibid.

<sup>20</sup> Ibid., p.440, footnote 4.

<sup>22</sup> Ibid., p.446.

<sup>24</sup> Ibid., p.450.



He said,

The Court has misapplied a great constitutional principle. ... I cannot see how an 'official religion' is established by letting those who want to say a prayer, say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation.<sup>25</sup>

He did not consider whether children would "voluntarily" recite a prayer without the aid, assistance, and encouragement of their teachers and administrators.

The last of the school Establishment cases are Schempp and Murray.<sup>26</sup>

These cases, decided together by the Court, arose in Pennsylvania and Maryland, respectively, under state statutes requiring Bible reading at the commencement of each school day. In each instance, the statutes were amended in the course of the litigation permitting a child's excusal on parental request. The Schempps, who were Unitarians, testified that there were "religious doctrines purveyed by a literal reading of the Bible which were contrary to the religious beliefs which they held and to their familial teaching." Schempp further testified that he did not have the children excused from attending the exercises because, among other things, he believed "that the children's relationships with their teachers and classmates would be adversely affected," that the "children would be labeled as 'odd-balls'," and further, that children were likely to lump together all particular religious differences and/or objections "as atheism, which is often connected with atheistic communism."<sup>27</sup> There was also expert testimony introduced in the lower court that the Bible was of great moral, literary, and historical value, but that there were significant differences in the meaning attached to various parts of the Bible by different religious

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<sup>25</sup>Ibid., p.445.

<sup>26</sup>Abington School District v. Schempp, and Murray v. Curlett, decided together in 374 U.S. 203 (1963), hereinafter referred to as Schempp.

<sup>27</sup>Ibid., p.208.

groups, and that when read without explanation, could be psychologically harmful to a child.<sup>28</sup> The Federal District Court, where the action was brought, found that the reading of the verses "possesses a devotional and religious character and constitutes, in effect, a religious observance." In striking down the statute, the Court also found that the Holy Bible is a Christian document and that the practice prefers the Christian religion.<sup>29</sup>

The Maryland case was brought by Mrs. Madelyn Murray, a professed atheist, for her son, William, a student in the Baltimore school system. She claimed that the statute was in violation of their rights of "freedom of religion under the First and Fourteenth Amendment" in that it threatened "their religious liberty by placing a premium on belief as against non-belief and subjected their freedom of conscience to the rule of the majority. ..." <sup>30</sup> The respondents demurred and the Maryland Trial Court sustained the demurrer, that is, upheld the validity of the statute.<sup>31</sup> The Maryland Court of Appeals, in a four-to-three decision, affirmed the lower court;<sup>32</sup> the Supreme Court granted certiorari.

Mr. Justice Clark wrote the opinion of the Court holding that Bible reading and recitation of prayer in the public schools, even though participation is "voluntary" constitutes an Establishment of religion which is prohibited by the First Amendment as applied to the states through the Fourteenth.<sup>33</sup> He began

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<sup>28</sup> Ibid., p.209.

<sup>29</sup> Ibid., p.210. For lower court decisions, see 177 F. Supp. 398, E.D. Pa., (1959); 201 F. Supp. 815, (1961).

<sup>30</sup> Schempp. op.cit., p.212.

<sup>31</sup> The school board, by demurring, admits all the facts pleaded by the petitioner - including the fact that the exercise in question is a religious exercise - but denies the applicability of the law.

<sup>32</sup> Ibid., p.212, 228 Md. 239, 179 A 2d 687, (1960).

<sup>33</sup> Schempp. op.cit., p.212.

his analysis of the problem by reiterating the Zorach dicta "We are a religious people ..." and cited the numerous evidences of this in our public life;<sup>34</sup> however, our belief in religious liberty is also strong<sup>35</sup> and re-affirmed that the "government is neutral, and while protecting all, it prefers none, and it disparages none."<sup>36</sup> He went to some length to affirm the Court's position that the First Amendment "has been made wholly applicable to the states by the Fourteenth Amendment,"<sup>37</sup> and that "this Court has rejected unequivocally the contention that the Establishment clause forbids only governmental preference of one religion over another." This was settled in the Cantwell case,<sup>38</sup> and re-affirmed in Everson (both by the majority and the dissenters), in McCollum, in Zorach, in McGowan v. Maryland, Torasco v. Watkins<sup>39</sup> and Engel. He explained his reiteration of these well-established principles by saying,

"While none of the parties to either of these cases has questioned these basic conclusions of the Court, ... others continue to question their history, logic, and efficiency. Such contentions, in the light of the consistent interpretations in cases of this Court seem entirely untenable and of value only as academic exercises."<sup>40</sup>

He further re-affirmed the inter-relationship and duality of the religious clauses of the First Amendment. The Establishment clause has been considered by the Court eight times and it has consistently held that the "clause withdrew all legislative power respecting religious belief or the expression thereof."<sup>41</sup>

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<sup>34</sup>Ibid., p.213.

<sup>35</sup>Ibid., p.214.

<sup>36</sup>Ibid., p.215. Originally quoted in an Ohio case by Judge Alonzo Taft, father of Chief Justice Taft.

<sup>37</sup>Ibid., p.216. This is the first time the Court has found it necessary to mention incorporation.

<sup>38</sup>Ibid., p.215, referring to Cantwell v. Connecticut, 310 U.S. 296, (1940).

<sup>39</sup>367 U.S. 488, (1961). See appendix herein.

<sup>40</sup>Schempp. op.cit., p.117. (The Justices are sensitive to public opinion!)

<sup>41</sup>Ibid., p.222.

The test is "what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." To withstand the strictures of the Establishment clause, there must be secular legislative purpose and primary effect which neither advances nor inhibits religion. The Free Exercise clause withdraws from legislative power the exertion of any restraint on the free exercise of religion.<sup>42</sup>

In applying the law to the instant facts, Justice Clark found that the religious character of the exercise was admitted by the State by its ruling that the Douay version of the Bible may be used and that pupils may be excused even though the State contended that part of its secular purpose was the promotion of moral values to counteract the materialistic trends of our times, etc. The conclusion followed that in both cases, the laws required religious exercises and such exercises were being conducted in direct violation of petitioners' rights.<sup>43</sup> He made it quite clear that a study of the Bible, or of religion, objectively presented as part of a program of secular education, does not fall within this prohibition. He further emphasized that "while the Free Exercise clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it never meant that a majority could use the machinery of the State to practice its beliefs" - citing Justice Jackson in the Barnette case. The very purpose of the Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts.

Justice Douglas, in a separate opinion, agreed that the state could not conduct a religious exercise without violating the neutrality required of the

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<sup>42</sup>Ibid.

<sup>43</sup>Ibid., p.223.

State.<sup>44</sup> But, further, in a position similar to his stand in Engel, he said the Establishment clause also forbids the State "to employ its facilities or funds in a way that gives any church or all churches greater strength in our society than it would have by relying on its members alone." Through the mechanism of the state, all of the people were required to finance a religious exercise that only some of the people wanted and that violated the sensibilities of others; this violated the First Amendment - it is not the amount of the funds expended, he said, but the use to which they are put.<sup>45</sup>

Mr. Justice Brennan, setting forth his views in a separate opinion, joined fully in the opinion and judgment of the Court. In a scholarly, detailed, and thoughtful presentation, Brennan analysed the whole problem of church-state relationships. Referring to the Founding Fathers, and particularly to Madison and Jefferson, he reached the crux of the problem when he stated,

I doubt if their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry, it seems to me, is whether the practices here challenge or threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.<sup>46</sup>

A literal quest for the intent of the Founding Fathers is futile because:

1. the historical record is ambiguous, 2. the structure of American education has greatly changed since the adoption of the First Amendment, 3. our religious composition makes us vastly more diverse people than our forefathers were, and 4. the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of religious diversities among the population which the public schools serve.<sup>47</sup>

In reviewing the history of the Court's decisions in important State -

<sup>44</sup>Ibid., p.229.

<sup>45</sup>Ibid.

<sup>46</sup>Ibid., pp.235-6.

<sup>47</sup>Ibid., pp.236-240.

Religion cases, Brennan finds that the distinctions between the Hamilton<sup>48</sup> and Barnette cases crucial to the resolution of the present cases - Hamilton dealt with the voluntary attendance at college of young adults, while Barnette involved the compulsory attendance of young children at elementary and secondary schools.<sup>49</sup> A discussion of the absorption of the Establishment clause into the Fourteenth Amendment, and the Blaine Amendment led the Justice into a discussion of the duality of the Religion clauses of the First Amendment, and a review of the three cases discussed above which led to the present case. He cited the language of the Everson case, carefully pointing out that four of the Justices disagreed with the result of the case.<sup>50</sup> He rejected the contention that Zorach overruled McCullum in silence, and also noted that they were not distinguishable in terms of Free Exercise. The crucial difference was that McCullum offended the Establishment clause while Zorach did not - not because of the public funds which were involved, but rather because the McCollum program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects. "A request from one in authority is understood to be mere euphemism; it is in fact, a command in an inoffensive form."<sup>51</sup>

The Sunday Law cases, Brennan said, considered the contention that establishing a uniform day of rest was a violation of the Establishment Clause, but found that although the purpose was originally a religious one, these laws

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<sup>48</sup>Hamilton v. Regents of University of California, 293 U.S. 245 (1934). Action brought by conscientious objectors. Issue was whether State could compel students at State University to participate in military training-instruction against their religious convictions. Held: compulsory military training at State University did not violate the right of Free Exercise since there is neither a constitutional right nor legal obligation to attend the State University.

<sup>49</sup>Schempp, op.cit., p.252.

<sup>50</sup>Ibid., p.260.

<sup>51</sup>Ibid., p.263.

were continued in force for reasons wholly secular,<sup>52</sup> and were enforced for wholly secular objectives which could not be effectively achieved in a modern society except by designating Sunday a uniform day of rest. In the Torasco case, on the other hand, although Free Exercise rather than Establishment was involved, the state attempted to use a religious means for achieving a purely secular goal; the states' interest in the integrity of its Notary Publics did not warrant the screening of applicants by a religious test. Both cases, therefore, stand for the proposition that government may not use religious means to serve secular interests without the clearest demonstration that non-religious means will not suffice. Like the prayer in Engel, these exercises are clearly religious, and, unlike the Sunday closing laws, they have not lost their religious purpose or religious character by the passage of time.<sup>53</sup>

Although Brennan could well have stopped at this point, he felt it necessary to discuss three other contentions which had been raised in the case and deserved the Court's attention. The first argument raised was that the purpose of the exercise was clearly secular; moral and spiritual values were taught and a solemn exercise inspired better discipline. "To the extent that only religious materials will serve this purpose, it seems to me that the purpose, as well as the means is plainly religious, that the exercise is necessarily forbidden by the Establishment clause."<sup>54</sup> The second argument that Brennan refuted was that the practices involved were unobjectionable because they preferred no sect at the expense of the others - in fact, the practices did prefer some sects over the others - there are too many different views on how the Bible, which is a sectarian book, should be read and studied; and "even if the Establishment clause were oblivious to non-sectarian religious practices, I think it quite likely that the 'common core' approach would be

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<sup>52</sup>Ibid.

<sup>53</sup>Ibid., p.278.

<sup>54</sup>Ibid.

sufficiently objectionable to many groups to be foreclosed by the prohibitions of the Free Exercise clause." The third element to be considered was that provisions for excusal were made. Once it was found that these practices were essentially religious, the availability of excusal or exemption had no relevance to the Establishment question; further, the excusal procedures necessarily operated in such a way as to violate the right of Free Exercise by requiring, in effect, a profession of disbelief.<sup>55</sup> Brennan cited extensive studies of behavioral scientists concerning the effect of similar situations upon children.<sup>56</sup> The final contention of the school officials that the Court, by invalidating these exercises, would have to declare every vestige of cooperation between religion and government unconstitutional, he rejected summarily.

"Religious exercises in the schools present a unique problem. For not every involvement of religion in life violates the Establishment clause." The test of what is forbidden under the Establishment clause is those involvements with secular institutions which (a) serve essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental aims where secular means would suffice.<sup>57</sup>

After making it very clear that the practices complained of in the instant case violated the Establishment clause, Justice Brennan explained in some detail the forms of accommodation between government and religion which showed government neutrality and not hostility to religion.<sup>58</sup> A. Where there is a conflict between Establishment and Free Exercise; for example, when the government has deprived individuals of their right of Free Exercise, such as in penal institutions or military installations, the government may provide chaplains

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<sup>55</sup>Ibid., p.288.

<sup>56</sup>Ibid.

<sup>57</sup>Ibid., p.295.

<sup>58</sup>Ibid., p.298.



without violating the Establishment clause. Therefore, this is distinguishable from sponsoring daily prayer and Bible reading in elementary and secondary schools in that, in the former situation, there is no element of coercion present and involves adults, not children.<sup>59</sup> B. Devotional exercises in Legislative bodies - again dealing with mature adults,<sup>60</sup> he added that this could well be a "political question" since the Constitution makes each House monitor of its own Rules.<sup>61</sup> C. The non-devotional use of the Bible in public schools is certainly not foreclosed by the decision - nor are the propriety of tax exemptions or deductions which incidentally benefit the religious institutions in question; nor are religious considerations in public welfare programs, and/or activities which although originally religious in origin, have lost their religious significance.<sup>62</sup> This latter point would, in the Justice's opinion, serve to insulate from the application of the First Amendment such things as "In God We Trust" and patriotic exercises which invoke the name of the Deity.<sup>63</sup>

Mr. Justice Goldberg, with Mr. Justice Harlan, submitted still another concurring opinion. They, too, joined completely in the opinion and judgement of the Court, but added a caveat; the two parts of the First Amendment are to be read together in the light of the single purpose they are designed to serve - the promotion and assurance of the fullest possible scope of religious liberty and tolerance for all, and to nurture the conditions which secure the best hope of attainment of that end.<sup>64</sup> Not all involvements of government and religion are prohibited; there are required and permissible accommodations between government and religion - the Schempp case does not fall within such permissible

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<sup>59</sup>Ibid., p.299.

<sup>60</sup>Ibid., p.300.

<sup>61</sup>Ibid., p.301. This issue could only be raised by a member of Congress, quite unlikely if the Congressman expected to be re-elected.

<sup>62</sup>Ibid., p.301, et.seq.

<sup>63</sup>Ibid.

<sup>64</sup>Ibid., p.305.

accommodation. The state has organized its facilities to engage in an unmistakable religious practice, during the curricular day, involving young impressionable children, whose attendance is compelled; and has utilized the prestige, power, and influence of the school administration staff and authority - this is not simply an accommodation.<sup>65</sup> This, he said, is the holding of the Court, and no more. Practices which do not create any of the dangers the Amendment is designed to prevent, and do not involve the state in religious exercises, are not prohibited;<sup>66</sup> each case will be decided individually - "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."<sup>67</sup>

Mr. Justice Stewart, the lone dissenter, would have remanded the cases for the taking of additional evidence, before he could judge whether the Establishment clause had necessarily been violated (he commented parenthetically that neither of the complainants raised the issue of Establishment, but rather alleged violations of their religious liberty).<sup>68</sup> Historically, the church and state interact in numerous ways, and, although in many cases the two clauses in the First Amendment complement each other, there are areas where a doctrinaire reading of the Establishment clause would be in irreconcilable conflict with the Free Exercise clause.<sup>69</sup> It is, in his view, a fallacious oversimplification of the meaning of the First Amendment to regard them as a single constitutional standard of "separation of church and state." Stewart felt that there was a substantial Free Exercise claim on the part of those who affirmatively desire to have their children's school day open with passages from the Bible;<sup>70</sup> compulsory state schooling structures a child's life so that he does not get religion in school, Stewart said, religion, therefore, is

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<sup>65</sup>Ibid., p.305.

<sup>67</sup>Ibid., p.306.

<sup>69</sup>Ibid., p.309.

<sup>66</sup>Ibid., p.306.

<sup>68</sup>Ibid., p.309.

<sup>70</sup>Ibid., p.312.

placed at a disadvantage.<sup>71</sup> He also raised a point of judicial construction which had not been mentioned in some time in connection with Bill of Rights cases - that is that the Court is "under a duty to interpret these provisions so as to render them constitutional if reasonably possible."<sup>72</sup> Without coercion on the part of pupils to participate, there is no establishment, according to Stewart.\*

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<sup>71</sup>Ibid.

<sup>72</sup>Ibid., p.316.

\* The cases reviewed above are the principal cases involving the schools and religion. There are several other recent occasions in which the Court further discusses the religion clauses that are significant in any study of this subject. They are briefly reviewed in the Appendix herein.

## Chapter V

### LEARNED CRITICS

The problems which have confronted the Court in these cases are not only constitutional and philosophical, but also highly emotional and controversial. The comments of prominent writers in the field are illustrative of the complexity and diversity of opinion with which the Court is faced. There are two conflicting theories regarding the interpretation of the religion clauses of the First Amendment which several Justices seem to have taken into account, but have not clearly articulated. Many writers have also considered this conflict but have not been able to express it definitively. Edmund Cahn of New York University School of Law refers to the two views as the Jeffersonian - Enlightenment view and the Madisonian - Dissenter view.<sup>1</sup> Under the Jeffersonian, or "narrow" view, the Establishment clause has no vitality of its own, but exists merely to implement the Free Exercise clause, while under the Madisonian, or "broad" view, Establishment not only implements Free Exercise but also is a self-sufficient imperative "meriting the most scrupulous obedience because it safeguards the purity of organized religion itself."<sup>2</sup> In other words, it represents the right of organized religion to be independent of the state and of the state to be independent of organized religion.

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<sup>1</sup>"Misunderstanding of the Establishment Clause," 36 N.Y.U. L.Rev. 1277. (1961). His exact reasons for assigning these names escape this writer, but they do serve as convenient "handles."

<sup>2</sup>Ibid., p.1278.

Under the first view, an Establishment exists when any act of government interferes or abridges in any way the free exercise of an individual's religious beliefs - but the element of interference with Free Exercise must be present. This seems to be the approach taken by the dissent in both Engel and Schempp. Following this theory, prayers in schools, and non-discriminatory and impartial aid, financial or otherwise, to all religious institutions would be constitutional. Under the second theory, any involvement of government in religious activity would constitute Establishment and come within the prohibition of the First Amendment. This would be true whether the involvement came through taxation or by virtue of the power and prestige of government, and whether or not it interfered with Free Exercise. This view, carried to its logical conclusion, would not only prohibit tax aid to religious institutions, but also tax exemptions, and probably such things as "In God We Trust" on coins, "under God" in the flag salute, etc. Professor Wilber G. Katz<sup>3</sup> would add a third interpretation of the First Amendment, which he refers to as the principle of neutrality, and which he summarizes as "no help unless no help would be harm."<sup>4</sup> In other words, a State cannot be actively hostile towards religion, but rather be benevolently neutral in religious matters. This is a middle ground which would prohibit direct aid to any religious institution, but would not interfere with the present tax structure and references to the Deity in public life.

The Court has not espoused any of these views completely, although the language of the cases, if not the decisions themselves, would bring them closer to the position of neutrality suggested by Professor Katz. The learned

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<sup>3</sup>Professor of Law, University of Wisconsin, former Dean, University of Chicago School of Law, statement and testimony before Judiciary Committee, Hearings, pp.813-819.

<sup>4</sup>Ibid., p.818.

critics are divided in their opinions along these same lines. They cite the Founding Fathers, particularly Madison and Jefferson; they discuss the various meanings of "religion," "sectarian," and "church," and no one has had difficulty finding convincing authority to support his particular stand. The charge of being "result-oriented" is often leveled at the Court - in this subject it could well be leveled at the critics; their dissatisfaction is aimed at the decision rather than the reasons. In reading the many Law Review Articles, books, and magazine articles, one gains the impression that each writer had a preconceived idea of what the result should be and then supported it. This is most understandable, for the subject of religion is very personal, very emotional, and not necessarily rational - it can be quite difficult to divorce one's prejudices from an objective study of what the "law" is, and what it should be. The writers do agree, however, that the cases taken as a whole offer no real pattern or guide for the future.

Cahn is probably the most articulate exponent of the Madisonian - Dissenter view<sup>5</sup> based on philosophical, ethical, moral, and historical grounds. The First Amendment calls for a complete separation of church and state. In light of the background, the Engel decision was as predictable as the judicial process ever can be.<sup>6</sup> The decision was almost unanimous as compared to the school bus case and the Sunday closing laws, because the subject matter was purely religious and uncomplicated by questions of economics or public safety; he agrees, too, that the idea of a non-denominational prayer is fallacious - that the expression is a contradiction in terms. Many other constitutional scholars agree with Cahn. For example, Louis Pollack states, "By placing the decision on the

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<sup>5</sup>Edmund Cahn, "On Government and Prayer," 37 N.Y.U. L.Rev. 981, (1962).

<sup>6</sup>Ibid., p.986.

Establishment clause, the court evidenced a high order of responsibility."<sup>7</sup> This reflects the Everson view set forth by Rutledge, which he feels will ultimately prevail.<sup>8</sup> "By design, the religious freedom clauses were designed to protect minority religious groups and non-believers from the majority."<sup>9</sup> Philip Kurland<sup>10</sup> agrees that "establishment" does not rest on compulsion, but questions the majority's reliance on history (since no cases were cited) because he argues that historical arguments are not really valid unless it is assumed that "due process" is static.<sup>11</sup> Leo Pfeffer (counsel for the American-Jewish Congress, and for the plaintiffs in several of the above cases) also takes the view that there "is a distinction in conceptual foundation of the two clauses" that practical as well as ideological considerations were involved in creating a complete separation of church and state.<sup>12</sup>

Many critics take the other view - (one is reminded of the parable of the elephant and the three blind men - each man found what he was looking for!). It is interesting, but not too surprising, that the articles in the Catholic Law Reviews generally adopt the narrower interpretation of the religion clauses of

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<sup>7</sup>Louis H. Pollack, "Public Prayers in Public Schools," 77 Harv. L.R. 62, (1963). p.70.

<sup>8</sup>Louis H. Pollack, "W.B.R. Some Reflections," 71 Yale L.R. 1451, (1961), p. 1456.

<sup>9</sup>Harry N. Rosenfeld, "Separation of Church and State in Public Schools," 22 U. of Pitt. L.R. 561, (1960), p.562. An excellent article which objectively reviews the history of church-state relationships in the courts, the purpose of the First in the light of our history, and concludes that complete separation is called for.

<sup>10</sup>The Supreme Court Review, Philip Kurland, ed.; Chicago, U. of Chic. Press, (1962). The Regents' Prayer Case; "Full of Sound and Fury, Signifying ..." p.3.

<sup>11</sup>Ibid., p.22.

<sup>12</sup>Leo Pfeffer and F. X. O'Neill, "The Meaning of the Establishment Clause - A Debate," 2 Buf. L.R. 225, (1953), p.228. See also Pfeffer, "Court, Constitution, and Prayer," 16 Rutgers L.R. 735, (1962).

the First Amendment.<sup>13</sup> It is even more interesting that those who support the "broad" view make the point that the Bible is a sectarian book, and that there is no such thing as a non-sectarian prayer. This point seems to have been "overlooked" by the proponents of the "narrow" view.

Paul G. Kauper, of the University of Michigan Law School,<sup>14</sup> applauds the narrowness of the Engel decision, asserting that the case does not outlaw prayer. (This same point was emphasized by others although it should have been obvious that the prayer was "outlawed" because it was a religious and devotional exercise.) He agrees with the New York Court of Appeals' decision that the Regent's prayer was permissible as long as those objecting were protected, and cites with approval the Chief Justice of that court that "'it is a fundamental rule of interpretation that the sense of the nation at the time of the adoption' of the amendment be taken into account, and that 'prayer is an integral part of our national heritage'".<sup>15</sup> Kauper further states that non-discriminatory financial aid to parochial schools would be constitutional, since the government can and does impose educational standards on them. Charles B. Nutting<sup>16</sup> agrees, but does not feel that the Court will accept this view in light of the Engel case. This distresses him because "it is clear that originally in the American Colonies religion was a matter of government concern" and that "the encouragement and strengthening of religion through government action is a part of the cultural heritage of this country." (!)<sup>17</sup>

Still a third school of thought would have had the Court duck the issue in

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<sup>13</sup>See 31 Ford. L.Rev. 201, (1962); 31 Geo. Wash. L.R. 497, (1962);  
<sup>11</sup>Loyola L.R. 358, (1962-3); 46 Marq. L.R. 233, (1962-3).

<sup>14</sup>"Prayer, Public Schools and the Supreme Court," 61 Mich. L.R. 1031, (1963).

<sup>15</sup>Ibid., p.1034.

<sup>16</sup>"Some Reflections on the Positive State," 49 Va. L.R. 729, p.733, (1963).

<sup>17</sup>Ibid., p.736.



one way or another. One writer, comparing the American Federal system to that of Switzerland,<sup>18</sup> sees the problem as one of federalism, and suggests that the Establishment clause should not be incorporated into the Fourteenth Amendment and that the Court has done so without reference to Cardozo's "ordered liberty."<sup>19</sup> Establishment does not define an individual freedom, O'Brian says, but was merely intended to be a restriction on the Central government; establishment can exist without infringing on religious liberty, in fact, religious coercion has not occurred in America.<sup>20</sup> Arthur Sutherland of Harvard,<sup>21</sup> one of the few authorities who feels that the court arrived at the right result for the wrong reasons, would have preferred that the case have been decided on the basis of available precedent, that is, on Free Exercise. The new approach under Establishment opens the door and obliges the court to pass on the validity of comparatively insignificant manifestations of religious activity in public education. He would advise the Court to exercise judicial restraint - in fact, the Court should have refused the suit on the grounds of di minimus - (certainly one might apply the doctrine of de minimus to some religious expressions in public schools, but it would seem to this student that an activity which is repeated daily becomes more of a mountain than a molehill), and he advocates the same restraint on the part of other governmental bodies, including school boards. Dean Erwin Griswold<sup>22</sup> cites his colleague with approval. He feels

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<sup>18</sup>Fr. William O'Brian, "The Engel Case From A Swiss Perspective," 61 Mich. L.R. 1069, (1963).

<sup>19</sup>Ibid., 1083.

<sup>20</sup>Ibid., p.1083, footnote #75. but see Boles, op.cit., p.177; Blanchard, op.cit., p.33; Hearings, op.cit., pp. 2036, 1060, 447, etc.

<sup>21</sup>"Establishment According to Engel," 76 Harv. L.R. 25, (1962).

<sup>22</sup>Erwin N. Griswold, "Absolute is in the Dark - A Discussion of the Approach of the Supreme Court to Constitutional Questions," 8 Utah L.R. 167 (1963) cited in Hearings, p.1017.

that this was a local matter which the court should not have considered. In accordance with the Barnette decision, as long as participation is voluntary, a non-believer can refrain. He disagrees with the social scientists who assert that the school situation creates compulsion - as a matter of fact, the disbeliever is different, and might as well get used to being so considered.

Others defining religion narrowly, argue that it was the intent of the Framers to place all religions on an equal footing, that "Establishment" simply means that there be no national church.<sup>23</sup> Still others believe that in using the historical approach, the Court did not take into account the underlying policy of the Establishment clause - which is to eliminate divisiveness - and that the exact meaning will depend on the circumstances since what is divisive in one situation will not be in another.<sup>24</sup> Wilber Katz takes the position that religion is only free when it is free of coerced support as well as coercive restrictions, and that strict separation actually reduces the area of religious freedom.<sup>25</sup> He feels that the reason for the involvement of the American Civil Liberties Union and other such organizations, despite the resulting restraint of religious liberty, is fear of the Roman Catholic Church as a threat to potential religious freedom, since a Catholic state would not permit dissenting groups to carry on general propaganda.<sup>26</sup>

A unique and most intelligent approach to the problem of the meaning of Establishment was presented in the Tulane Law Review in 1963. It analyzed those activities which are nearly universal in countries which do have an

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<sup>23</sup>James F. Janz, "Church and State; Prayer in Public Schools," 46 Marq. L.R. 234, (1962).

<sup>24</sup>Student note, 16 Vand. L.R. 205, (1963).

<sup>25</sup>Wilber Katz, "Freedom of Religion and State Neutrality," 20 U. of Chi. L.R. 426, p.433, (1953).

<sup>26</sup>Ibid., p.436.

established church.<sup>27</sup> Where there is an established church, the government

1. Prescribes prayers and forms of worship.
2. Exercises some control over the appointment of church officers.
3. Requires religious instructions in public schools.
4. Pays the salary of clergy or otherwise subsidizes church.
5. Requires the chief of state or others to profess a certain faith.<sup>28</sup>

In the United States, there has been controversy over all but the second! The argument that prayer in the schools is based on our spiritual heritage is probably the most damaging one that can be made because the "preservation and use of national spiritual heritage is the raison d'etre for the establishment of state churches." The First Amendment goes further than merely prohibiting the establishment of a church - it provides there is to be no establishment of religion, thus effectively removing it from the political domain.

The Court has not espoused any of these views completely, although the language of the Establishment cases, if not the decisions themselves, would bring the majority of the Court close to the position of benevolent neutrality suggested by Professor Katz, with Justice Stewart adopting the narrow position that interference with Free Exercise must be shown, and Douglas embracing the strict separation.

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<sup>27</sup>Student note, 37 Tul. L.R. 124, (1963), p.127.

<sup>28</sup>Ibid.

## Chapter IV

### PROGNOSIS

Predicting the Court, like ranking the Presidents, has long been a favorite sport of political scientists - professionals and amateurs alike. This writer, too, has succumbed to the lure of the game. The critics of the Court seem to agree that the Court has not set forth guidelines for the future because the Court has not clearly defined Establishment. Despite the apparent lack of a definition, I feel the Court has indicated the course it will follow. The Court, after all, rarely draws a blueprint, but traditionally decides issues on a case by case basis, each decision building on the preceeding one.

It is clear from the five principal cases discussed herein - and from the Jehovah's Witnesses cases - that Free Exercise is the right to practice or not to practice one's religion without interference from government. The Court indicates that there is a difference between Free Exercise and Establishment, but has not spelled out that difference. The cases discussed herein represent the two sides of the freedom of religion coin - the Everson case involving public tax support of religious schools, and the others involving religious activity in tax-supported public schools; the decisions in all five were based on the Establishment clause. There was no Establishment found in Everson because the spending of tax funds to provide buses for parochial school pupils served a public purpose which only incidentally benefited the religious institutions. In McCullum and Zorach, both involving released time, the existence of Establishment was determined by the use of tax funds to support religious

activity; on-premises released time was held to be such a use of tax funds as to constitute Establishment, while off-premises released time was not an Establishment because it did not involve the use of tax funds. In Engel and Schempp, the Regents' prayer, Bible reading, and the recitation of the Lord's prayer - all clearly religious activities - were held to constitute an Establishment because they were conducted on a systematic basis, on public school property, and sponsored by public school authorities. The use of tax funds to support a religious activity, the use of public property and public authority to support or promote a religious activity; these, at the very least, constitute Establishment.

In the last four of these cases, the issue of Free Exercise was also raised by plaintiffs, but in each case Free Exercise was considered irrelevant and immaterial and the Establishment clause controlling. Dicta would indicate that where the Court finds Establishment, it is not necessary to prove that the right to Free Exercise has been abridged.<sup>1</sup> However, the majority in each of these cases indicates that the school situation itself creates a compulsion which does abridge the right of Free Exercise, even though participation is "voluntary."<sup>2</sup> It is this point which separates the majority from the minority. The dissenters in each case agree that if there were proof of actual coercion on the pupils to participate, there would be an unconstitutional activity. The minority demands proof; the majority in effect takes "judicial notice" of the compulsory nature of the school situation.

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<sup>1</sup>See Black, Engel, op.cit., p.430; Brennan, Schempp, op.cit., p.298; the dissent in Zorach, op.cit., p.320; and the majority in McCullum, op.cit., pp.227,230.

<sup>2</sup>I remember rather vividly from my grammar school days in Pennsylvania, the taunts and teasing inflicted on a classmate who was a member of Jehovah's Witnesses, and refused to salute the flag. Despite the compulsory flag-salute law (this was pre-Barnette), the teacher permitted this student to remain seated - but the other children never for a moment let her forget that she was different, and odd.

It would appear that the difference between the Free Exercise and Establishment clauses is that the former involves negative or restraining action on religion or religious beliefs, while the latter involves positive support of religion. Government attempts to interfere with an individual's beliefs would be a violation of Free Exercise; government promotion of a particular set of beliefs (i.e. religion as opposed to non-religion) would violate the Establishment clause. Although it is somewhat of an over-simplification, it would not be inaccurate to say that Free Exercise tends to protect the "believer," no matter how odd his beliefs may be, and Establishment tends to protect the "non-believer," whether it be non-belief in religion in general or in a particular religion. The question then remains, is there an attempt to put the weight and authority of the government behind the support of religion; or posed in another way, who is sufficiently "injured" to have standing to sue?

Theoretically, Establishment can stand alone, without coercion; however, where there is no showing that the plaintiff personally has been injured, there is no way to attack such a practice. In those instances in which the plaintiff can show that he has been injured by an activity of the government, the Court is likely to find Establishment where a religious activity is at issue - of course, by showing injury, plaintiff also shows that his right of Free Exercise has been violated. For example, if the Hamilton case<sup>3</sup> were decided today, the Court would probably hold that plaintiff could not be denied the right to attend the state university because of his religious conviction and, therefore, compulsory military training would be a violation of plaintiff's right of Free Exercise, and unconstitutional as to him. Compulsory chapel attendance at a state university would undoubtedly be held to be an Establishment, and consequently, a prohibited activity; in order to have a standing to sue, however,

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<sup>3</sup>See p.80 herein.

plaintiff would have to show that his beliefs were violated - his right to Free Exercise was abridged. On the other hand, non-compulsory chapel at a government supported university could not be challenged because no one is injured sufficiently to have a standing to sue. Many practices which might be considered Establishment are simply immune from attack under the Mellon v. Massachusetts doctrine.

As a practical matter, the Supreme Court has settled the issue of religious activity in public life. Despite widespread predictions that the Justices would prohibit the singing of "America" by students; remove "In God We Trust" from coins; and ban the daily invocations in Congress, the Court has not done so.<sup>4</sup> The Court refused to review a decision of the New York Court of Appeals, holding that the inclusion of the words "Under God" in the pledge of allegiance did not constitute an Establishment,<sup>5</sup> and also refused to review another New York decision in which the United States Court of Appeals ruled that school officials had the power to ban "voluntary" prayers in public nursery schools.<sup>6</sup>

The other side of the coin, actual tax support for religious institutions, presents a much more difficult problem to the Court. There are two facets to this problem; 1) tax exemptions to religious institutions, and 2) outright tax aid to such institutions, the latter by far the most troublesome. On October 10, 1966, the Supreme Court denied certiorari in a Maryland case<sup>7</sup> brought by

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<sup>4</sup>For a comprehensive list of the "religious" activities of the government, see Justice Douglas, concurring opinion, Schempp, op.cit., p.440, footnote 4.

<sup>5</sup>Lewis v. Allen, Commissioner of Education of New York, 379 U.S. 923 (1964), cert. denied.

<sup>6</sup>New York Times, July 8, 1965, p.33 \_\_\_\_ U.S. \_\_\_\_ (1965) concerning the children's grace "God is great, God is good," etc., said before juice and cookies.

<sup>7</sup>Murray v. Controller of the Treasury #133, \_\_\_\_ U.S. \_\_\_\_ 17 L ed 2d 55 (1966).

Mrs. Madalyn Murray O'Hare - the plaintiff in the Maryland Bible reading case - who contended that tax exemptions for houses and buildings "used exclusively for public worship" amounted to an indirect subsidy to religious institutions, and was, therefore, a violation of the Establishment clause. Plaintiffs claimed that as taxpayers they were forced unfairly to pay a larger share of the taxes because churches which used public services failed to pay their share of the cost. The lower court held that the plaintiffs - atheists - had standing to sue, but dismissed the action on the merits. The Maryland Court of Appeals affirmed the lower court, saying that such "time-honored" exemptions are not an Establishment. To the extent that religious property is exempt, there may be an indirect subsidy, but in Maryland sixty other types of charities also have exemptions, and the major part of church work is charitable.<sup>8</sup>

The Court's refusal to review the case does not necessarily mean that the Justices agree that such exemptions are constitutional, but, merely that for its own reasons, it did not see fit to review the matter. The Court will probably maintain this position until it is "forced" by a conflict in the circuits, to consider the question.<sup>9</sup> Should the matter come before the Court, the Court could duck the issue by holding under the Mellon doctrine, that the interest of any single taxpayer was so nominal that no one had standing to sue. Such a decision would apply only to federal taxes, and allow state court decisions as to state taxes to stand. Should the Court decide the issue on the merits, it seems likely that the tax exemptions would be upheld on the grounds that, 1) to refuse exemptions to churches while granting to all other charitable, eleemosynary, and educational institutions would be showing hostility to religion rather than

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<sup>8</sup>Murray v. Comptroller of the Treasury, 241 Md. 383, 216 A. 2d 897 (1966).

<sup>9</sup>For a list of exemptions granted by the Federal government, see testimony of Congressman Derounian, Hearings, op.cit., p.644.



neutrality, 2) refusal to grant an exemption would be a violation of "equal protection of the laws," and 3) since there is no coercion or support of a particular set of beliefs, no Establishment exists.

Tax grants to religious schools - at all levels - will present the Court with its most difficult problem in this area. The provisions of the Aid to Elementary and Secondary Education Act of 1965 will undoubtedly provide the vehicle for testing this issue. This bill, a compromise carefully tailored to avoid the church-state issue, provides - instead of general aid to elementary and secondary schools for teachers' salaries and building construction, (which probably would have been stalled by those advocating aid to parochial and private schools) for shared time, community oriented educational programs, such as remedial reading and pre-school programs, and grants for purchase of educational and instructional materials. Many Congressmen, for reasons political or otherwise, have questioned the constitutionality of this bill; however, an amendment,<sup>10</sup> proposed by Senator Samuel Ervin of North Carolina, allowing a federal taxpayer's suit (to overcome the Mellon case de minimus ruling) was defeated by a coalition of Northern Democrats and liberal Republicans. It can be tested, however, on a provision which allows the states to sue the Commissioner of Education for withholding funds, or through the State courts. How it will be tested is not certain, but that it will be tested, there is no question.

The final decision of the Court in this matter will no doubt rest on the Everson case - either the decision itself, relying on the child-benefit theory, or on the language of the case which erected the "wall of separation" between church and state. In this area, the facts are all important, the way the case is presented will be controlling. It is the "child-benefit" theory on which the Federal Aid to Education Bill was predicated. As Justice Rutledge pointed

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<sup>10</sup> New York Times, April 10, 1965, p.1.

out in his Everson dissent,<sup>11</sup> the claim that support is to education and not religion because education is a public function does not deny that both the individual and the school are benefited directly and substantially.

This approach, if valid, supplies a ready method for nullifying the Amendment's guaranty, ... the only thing needed is for the Court to transplant 'public welfare - public function' view from its proper non-religious due process bearing to First Amendment application.<sup>12</sup>

Congressional findings of the public purpose to be served by giving every child a good education will be persuasive, and if, to paraphrase the minority in Everson, there is no religious test used in selecting the recipients of public funds, this may be controlling as to certain parts of the Bill. For example, after-school community centers for remedial reading would appear to have no connection with the religious institution which the child may attend during school hours.

On the other hand, grants for text-books, and other materials actually used in the parochial schools would seem to be such use of tax funds which would constitute an Establishment. In this instance, as Mr. Justice Goldberg said in the Schempp case, each case will be decided individually on its facts, for, "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."<sup>13</sup> In deciding on a case by case basis, the Court might well follow another recent Maryland Court of Appeals decision<sup>14</sup> which involved state grants to four church-affiliated colleges.

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<sup>11</sup>Everson, op.cit., pp.56-58.

<sup>12</sup>Ibid.

<sup>13</sup>Schempp, op.cit., p.306.

<sup>14</sup>Horace Mann League of the United States of America, Inc. v. Board of Public Works of Maryland, 242 Md. 645, 220 A 2d. 51 (1966).

The Horace Mann League of the United States challenged state grants for buildings to four church affiliated colleges; the trial court upheld all the grants, holding that their basic purpose and effect was secular and not religious. The Maryland Court of Appeals, in a four-three decision, reversed as to three of the colleges.<sup>15</sup> The grant to the fourth college, Hood, affiliated with the United Church of Christ, was upheld because "we are unable to say that the college is sectarian in the legal sense,"<sup>16</sup> and went on to say that "the matter of what is sectarian is rather elusive, being somewhat ephemeral in nature." The Court cited Douglas' dictum that the most effective way to establish an institution is to finance it, used the language of Everson to say that tax funds cannot be used to support an institution which teaches the tenets and faith of any church, nor can an individual be excluded from the benefits of valid public welfare legislation because of his faith or lack of it;<sup>17</sup> and the Brennan language of Schempp "if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could have reasonably attained the secular end by means which do not further the promotion of religion."<sup>18</sup> The Court set forth the following criteria for determining whether or not an institution was sectarian: 1) the stated purpose of the college, 2) college personnel - administration, faculty governing board, and student body - with emphasis on substantiality of religious control, 3) place of religion in college program, 4) relationship to sponsoring religious organization including extent of ownership, financial assistance and control, 5) results of the college's program such as accreditation and nature of activities of alumni, and, 6) work and image of the college in the community. The Court concluded that under these criteria, Hood was non-sectarian, while

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<sup>15</sup>Western Maryland-Methodist; Notre Dame and St. Joseph's - Roman Catholic.

<sup>16</sup>Horace Mann v. Board, op.cit., p.66.

<sup>17</sup>Ibid., p.63.

<sup>18</sup>Ibid., p.61.

Western Maryland College was "sectarian in the legal sense under the First Amendment and may not constitutionally receive the grants named in the Bill."<sup>19</sup> Among other things, its charter required that one-third of the Board be Methodist ministers so as to give the clergy a veto; the Board was heavily Methodist and nearly all Protestant; the faculty was committed to a Christian philosophy; and an atheist would not be employed. As to the two Catholic colleges, whose student bodies were 97 to 100 percent Catholic, the Court said "the whole life is lived in a Catholic atmosphere which assumes earthly life is to be lived in preparation for future life with God."<sup>20</sup> Granting aid to the above colleges would be using the coercive power of the state to materially aid religion. The dissenting judges, on the other hand, were of the opinion that grants to build a dining hall and science buildings were not an Establishment of religion.<sup>21</sup> Both plaintiffs and defendants appealed the decision but the Supreme Court refused to review, with Justices Stewart and Harlan indicating that the cases should have been set down for consideration.<sup>22</sup>

The Maryland Court accepted the fact that the institution benefited from the tax aid, regardless of the purpose of the aid. Where the institution was a sectarian religious institution, the Court found that the coercive power of the state served to materially aid that institution. A religious means (grants

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<sup>19</sup>Ibid., pp.68-9.

<sup>20</sup>Ibid., p.71.

<sup>21</sup>The majority left the door open when they said that the legislature was prohibited from taxing except for a public purpose, and Maryland has not yet declared universal higher education a public purpose of the state. The Court also indicated that the case was decided under the Maryland Declaration of Rights, "law of the land" provision, it was the equivalent of the due process clause of the Fourteenth Amendment which included the First Amendment. pp.73-76.

<sup>22</sup>Board of Public Works of Maryland v. Horace Mann League of the United States of America, Inc. cert. denied #473, November 14, 1966 \_\_\_ U.S. \_\_\_, 17 L ed 2d 195 (1966); Horace Mann League v. Board of Public Works, appeal dismissed #590, November 14, 1966, \_\_\_ U.S. \_\_\_, 17 L ed 2d 195 (1966).

to sectarian colleges) was used to attain a secular purpose (promote higher education), which could have been attained through secular means (grants to non-sectarian colleges), therefore, a public purpose was not served. The "child-benefit" theory is a most appealing one, and if the child can be completely divorced from the institution, the Supreme Court could properly find that a public purpose is being served. However, where a religious institution materially benefits from the coercive taxing power of the state, regardless of the benefit to the individual, there would appear to be an Establishment of religion in violation of the First Amendment. This approach follows the spirit of the First Amendment, as well as the Court's own precedents as set forth in McCullum, Engel, Schempp, and the dicta in Everson.

## EPILOGUE

Controversies over the relationship of church and state have plagued society from the beginning of recorded history. The Founding Fathers, in the Constitution and Bill of Rights, attempted to define that relationship for the United States. In the first part of this paper, I have cited every mention of religion in the fundamental documents of the New Nation. The fact of the matter is that there was very little discussion of religion. Can we, or should we try to ascertain the intention of the Founding Fathers from this meager evidence?

Every man, being a different and distinct individual, unavoidably has intentions somewhat different from those of every one else. Such a thing as a solid, completely unified intention of all the members in any group would be hard if not impossible to find.<sup>1</sup>

To cite the words of Madison or Jefferson as embodying the intentions of the many men who participated in these deliberations, is not only inaccurate but misleading. To attempt to assign specific intentions to these men with regard to prayers and Bible reading, school buses, etc., is equally misleading.

Intentions are highly subjective and personal things. They are not like badges pinned to a coat lapel. They lie deep in the hearts and minds of men. They are not always clearly stated by those who have them, nor even capable of clear and specific formulation. The words used to convey them seldom do so perfectly.<sup>2</sup>

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<sup>1</sup>William Anderson, "Intention of the Framers: A Note on Constitutional Interpretation," 49 Am. Pol. Sci. Rev. 34, (1955).

<sup>2</sup>Ibid.

Although we cannot ascertain exact intentions, we can find broad general principles in the words they used. The spirit of independence and liberty, the freedom from compulsion, the resentment of domination by an external imposed power, the equality of man, and the firm belief that every man has the right to choose for himself the pattern of his belief - these ideas are implicit in every word they wrote and said. These ideas should be the guidelines in any problem which affects the "inalienable rights of man." Today's Supreme Court is following in the tradition of the Founding Fathers in protecting those rights.

Interpretation of the religion clauses of the Constitution is at issue today precisely because the exact intentions of the Framers are not clear. The Supreme Court had no precedent to guide it in 1947 when it decided the Everson case. The Court, however, has developed guidelines for the nation in that most sensitive area involving man and religion - based not on the specific words of the Constitution, but on that same spirit of freedom and liberty that guided the Founding Fathers almost two hundred years ago.

## APPENDIX

There are three other recent Supreme Court decisions which, although not directly concerning the schools, do have a bearing on the interpretation of the Establishment clause of the First Amendment. The first of these is another Maryland case, Torasco v. Watkins, decided in 1961.<sup>1</sup> Roy Torasco, elected a Notary Public, refused to take the compulsory oath of office affirming his belief in God as required by the Maryland Constitution, and was denied his commission. Justice Black, speaking for a unanimous Court (with Frankfurter and Harlan concurring in the result), repeated and reaffirmed the definition of Establishment set forth in the Everson case, and added, "Neither State nor Federal governments can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."<sup>2</sup> He said the power and authority of the State of Maryland are put on the side of a particular sort of believers - that is, those who profess belief in God, but the State cannot constitutionally force a person to "profess belief or disbelief in any religion."<sup>3</sup> It is not clear, however, whether the decision is based on Establishment or Free Exercise, since

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<sup>1</sup>367 U.S. 488 (1961). The Constitutions of five other States required atheistic tests; Arkansas, Mississippi, North Carolina, South Carolina, and Tennessee.

<sup>2</sup>Ibid., p.492.

<sup>3</sup>Ibid.



Justice Black argued the former, but concluded that the test unconstitutionally invaded appellant's freedom of belief.

In the Conscientious Objector cases<sup>4</sup> the Court had before it a section of the Selective Service Act which granted exemption from military duties to those who objected because of their "religious training and beliefs." This was defined in the Act as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but not including<sup>7</sup> essentially political, sociological, or philosophical means or a merely personal code." The statute had been amended by Congress in 1940 from "Belief in God" to "Belief in a Supreme Being." The Act was attacked as being a violation of both the Establishment and Free Exercise clauses. The Court upheld the statute, and found that all three of the young men, none of whom professed to a belief in a Supreme Being, were eligible for exemptions from military service. In so holding, the Court said the test is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for exemption."<sup>5</sup> By so deciding, the Court avoided a constitutional question, and broadened the definition of religious beliefs so as to include those which are non-deistic. Had Congress not changed the statute, the Court might well have found an Establishment under Torcaso.

In the Sunday Closing Law cases<sup>6</sup> which preceeded Engel and Schempp by a year, the Sunday closing laws of several states were challenged under both the Establishment and Free Exercise clauses. It was claimed that by requiring

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<sup>4</sup>U.S. v. Segar, U.S. v. Jakobson, Peter v. U.S., \_\_\_ U.S. \_\_\_, 85 Sup.Ct. 850, (1965).

<sup>5</sup>Ibid.

<sup>6</sup>McGowan v. Maryland, 366 U.S. 420, (1961); Two Guys v. McGinley, (Pa.) 366 U.S. 582, (1961); Gallagher v. Crown Kosher Super Market, (Mass.), 366 U.S. 617, (1961).

businesses to be closed on Sunday, the tenets of Christianity were imposed on the community.<sup>7</sup> Chief Justice Warren, speaking for the majority, rejected this contention. In a rather fuzzy decision, he conceded that Sunday laws were originally religious in character - the issue before the Court was whether they were still religious in character.<sup>8</sup> He concluded that they were not, and, therefore, do not violate the First Amendment. He pointed out that many of our criminal laws have their root in religious teachings (bigamy, murder, etc.) but that doesn't make them Establishment. He affirmed the Everson rules regarding Establishment,<sup>9</sup> distinguished the instant case from McCullum (the only case up to that time in which Establishment was found) in that there is no compulsion to attend church, no direct cooperation or participation by church and church authorities, and no tax money to aid religion;<sup>10</sup> and concluded that "to say that a state cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would be giving a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state."<sup>11</sup> He cautioned, however, that Sunday legislation may violate the Establishment clause if it can be demonstrated that "its purpose - evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect - is to use the States' coercive power to aid religion."<sup>12</sup>

Frankfurter, joined by Harlan, in a lengthy, comprehensive, detailed concurring opinion, defined the purpose of the two religion clauses of the First Amendment. The Free Exercise clause serves to protect unpopular creeds,<sup>13</sup> while the Establishment clause is "to assure that the national legislature

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<sup>7</sup>McGowan, op.cit., pp.430,431.

<sup>8</sup>Ibid., p.431.

<sup>9</sup>Ibid., p.443.

<sup>10</sup>Ibid., p.452.

<sup>11</sup>Ibid., p.445.

<sup>12</sup>Ibid., p.453.

<sup>13</sup>Ibid., p.464.

would not exert its power in the service of any purely religious end; it would not, ... make of religion, as religion, an object of legislation."<sup>14</sup> The Establishment clause and the fundamental separationist concept which it expresses is not concerned with regulations which have other objectives.<sup>15</sup> The state can reasonably find Sunday a socially desirable day of surcease from subjection to labor and routine - from this cannot be derived a purpose to establish or promote religion. Even though another day could be set aside, it would not be as effective since different members of the family might have different days off, it would be difficult to enforce, etc.; he thus rejected the contention that Sabbatarians be given an alternative so that they would not be at a competitive disadvantage,<sup>16</sup> for, in view of the community interests which must be weighed in the balance, the disadvantage wrought by non-exempting Sunday statutes is not an impermissible imposition on the Sabbatarians' freedom.

Douglas vehemently disagreed, he would declare the laws unconstitutional as to those complaining,<sup>17</sup> and added that in the case of the Orthodox Jew, the vice is accentuated. For Douglas, the question is "whether the State can impose criminal sanctions on those who unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority." He objected that the Court, once having arrived at a general benefit and, therefore, no Establishment, dismissed all other objections as coming within the scope of the legislature's discretion. In other words, although there is no Establishment which voids the statute, its application to the Orthodox Jew plaintiff violates his right of Free Exercise since his religion requires him to maintain another day of rest, and, therefore, is unconstitutional in its application to him.

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<sup>14</sup>Ibid., p.465.

<sup>15</sup>Ibid., p.466.

<sup>16</sup>Ibid., p.520.

<sup>17</sup>Douglas is joined by Brennan and Stewart in his dissent in Braunfeld v. Brown, 366 U.S. 617, (1961), the case which involved a Kosher meat market and the Pennsylvania Sunday Closing laws.

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